86-382

No. _____

Supreme Court, U.S.
FILED
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROBERT B. SUTTON, SUTTON INVESTMENTS, INC.,
SCURRY OIL COMPANY, BPM, LTD., AND
SOONER REFINING COMPANY, INC.

PETITIONERS,

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

ANTHONY P. SUTTON
Oklahoma Bar Association #8781
Attorney at Law
4835 South Peoria, Suite 25
(918) 749-5815
Attorney for Petitioners, *pro bono*

William K. Powers
OBA No. 1862
Short, Harris, Turner & Daniel
2761 East Skelly Drive, Suite 700
Tulsa, Oklahoma, 74105
(918) 743-6201
Attorney for Petitioners, pro bono

August 28,1986

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QUESTIONS PRESENTED

I. Whether TECA erred in refusing to suppress all documents obtained by the United States in violation of Fed. R. Crim. P. 6(e) and in direct conflict with this Court's decision in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) and thus caused confusion in the application and enforcement of Rule 6(e).

II. Whether the remedy awarded to the United States was a penalty against Petitioners, rather than restitution; and whether, because the United States claim is a penalty, it is barred by (a) statute of limitations and (b) the doctrines of collateral estoppel and double jeopardy contained in the Fifth Amendment of the Constitution of the United States; and whether, because the Government's claim is a penalty, Petitioners are entitled to a jury trial;

III. Whether TECA erred in holding Individual Petitioner personally liable for the judgment entered in favor of the United States under the common law doctrines of alter ego and tortious conduct liability when such doctrines have been precluded by 15 U.S.C. §754(a)(4); and whether TECA erred in holding Individual Petitioner personally liable under a tortious conduct liability theory without providing Individual Petitioner with the right of trial by jury in violation of the Seventh Amendment of the Constitution of the United States.

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ROBERT B. SUTTON, SUTTON INVESTMENTS, INC.,
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PETITIONERS,

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Robert B. Sutton, (hereafter referred to as Sutton or Individual Petitioner), Sutton Investments, Inc., Scurry Oil Company, BPM, Ltd., and Sooner Refining Company, Inc., (hereafter referred to collectively as Corporate Petitioners), pray that a Writ of Certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals (hereafter referred to as TECA) entered in this matter of June 11, 1986.

**Affiliate and Subsidiary Companies of the Corporate Petitioners are: Boomer Oil Co., Inc.; Oil Patch Investment Co.; Redfish Bay Terminal, Inc.; BQP Industries, Inc.; BPM International, Ltd; and Robsutt, Ltd.*

CITATION TO OPINION BELOW

The June 11, 1986, written opinion of TECA, is the judgment sought to be reviewed, not yet reported (Temp. Emer. Ct. App. 1986) and is attached hereto as Appendix A.

JURISDICTION

The TECA judgment and written opinion was entered on June 11, 1986. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I. Whether TECA erred in refusing to suppress all documents obtained by the United States in violation of Fed. R. Crim. P. 6(e) and in direct conflict with this Court's decision in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) and thus caused confusion in the application and enforcement of Rule 6(e).

II. Whether the remedy awarded to the United States was a penalty against Petitioners, rather than restitution; and whether, because the United States claim is a penalty, it is barred by (a) statute of limitations and (b) the doctrines of collateral estoppel and double jeopardy contained in the Fifth Amendment of the Constitution of the United States; and whether, because the Government's claim is a penalty, Petitioners are entitled to a jury trial;

III. Whether TECA erred in holding Individual Petitioner personally liable for the judgment entered in favor of the United States under the common law doctrines of alter ego and tortious conduct liability when such doctrines have been precluded by 15 U.S.C. §754(a)(4); and whether TECA erred in holding Individual Petitioner personally liable under a tortious conduct liability theory without providing Individual Petitioner with the right of trial by jury in violation of the Seventh Amendment of the Constitution of the United States.

STATUTES INVOLVED

This case involves the following Federal Rules and Statutes:

I. Federal Rules of Criminal Procedure 6(e)(2) and 6(e)(3) of the Federal Rules of Criminal Procedure provide:

> (e) Recording and Disclosure of Proceedings.
>
> (2) General Rule of Secrecy - A grand juror, an interpretor, a stenographer, and operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision *shall not disclose* matters occurring before the grand jury, except as otherwise provided for in the rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> (3) Exceptions.
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to-
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duties to enforce federal criminal law.
>
> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the

government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made-

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

II. The Fifth Amendment to the Constitution of the United States provides in pertinent part, as follows:

No person shall. . .be subject for the same offense to be twice put in jeopardy of life or limb. . .nor be deprived of life, liberty, nor property, without due process of law. .

III. Title 15 U.S.C. §754(a)(4) provides as follows:

Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders or performs any of the acts or practices constituting in whole or in part a violation of paragraph (3), shall be subject to penalties under this subsection without regard to any penalties to which that corporation may be subject under paragraph (3) except that no such individual director, officer or agent shall be subject to imprisonment under paragraph (3), unless he also has knowledge, or reasonably should have known, of notice of non-compliance received by the corporation from the President.

IV. The Seventh Amendment to the Constitution of the United States provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

In 1978, the Department of Energy (hereafter referred to as DOE) commenced the first of two audits of Petitioners. DOE subpoenaed Petitioners' documents but abandoned the subpoena action and made no determination. Subsequently, the Department of Justice (hereafter referred to as DOJ) instituted a criminal proceeding in October, 1981. The grand jury investigation led to the institution of a criminal proceeding against Petitioners, and was managed by the DOJ with DOE personnel assistance. The criminal action sought forfeiture of all Petitioners' assets through the Racketeer Influenced and Corrupt Organization Act (hereafter referred to as RICO) in Counts 1 through 3 and charging in Counts 4 through 15 violations of the emergency price control regulations through mail fraud and wire fraud. On May 13, 1982, all Petitioners were acquitted on all such counts because there was insufficient evidence to go to the jury. Individual Petitioner was convicted of one count of obstruction of justice and one count of conspiracy to obstruct justice. No monetary judgment was rendered because the Government failed to carry its burden of proof.

The DOE commenced a second audit of Petitioners in June, 1982, using documents obtained without proper authorization from the grand jury that returned the criminal indictment against Petitioners. This 1982 audit forms the basis for the civil action filed against Petitioners after the unsuccessful asset seizure sought in the criminal case. The present civil action asserted the same violations and was based on the same transactions that were in issue in the criminal proceeding.

The civil complaint was brought under the guise of restitution, yet the measure of restitution was not based on unjust enrichment of Petitioners or injury to third parties. In addition to the fundamental error of TECA regarding Rule 6(e), TECA affirmed the district court's decision denying Petitioners a jury trial even though the Government's claim sought a penalty against Corporate Petitions and tortious conduct liability against Individual Petitioner.

Soon after the civil complaint was filed, Petitioners discovered that the Government had based its second audit upon material procured from the criminal grand jury in violation of the secrecy provisions of Fed. R. Crim. P. 6(e). Petitioners filed a Motion to Suppress the procured material. The district court agreed that the Government had violated Rule 6(e). The trial court reserved decision on an appropriate sanction for this violation and failed to suppress the illegally procured material.

Subsequently, Petitioners filed a Request for Certification of Interlocutory Appeal on the question of "whether grand jury documents should be suppressed when obtained by a Government agency in violation of Fed. R. Crim. P. 6(e) pursuant to an invalid court order issued after a Government agency had illegally gained access to the documents and used them to prepare an audit upon which civil case is based." From the bench, the district court again denied Petitioners' request.

In July 1983, following the decision of this Court in *United States v. Sells Engineering, Inc.*, 463 U.S. 418, (1983), Petitioners renewed their Motion to Suppress the procured material. *Sells* denounced *any* use of grand jury materials by agency personnel without a court order authorizing disclosure after a showing of a particularized need. In the case at bar, the trial court decided that the documents produced for the grand jury were subject to the requirements of Fed. R. Crim. P. 6(e) and that Petitioners had standing to challenge the Government's use of Petitioners' documents as well as third party documents employed in the criminal investigation, and that the Government had obtained documents in violation of Rule 6(e). Ultimately, the trial

court determined that only two percent (2%) of those documents obtained by the Government were obtained in violation of Rule 6(e). It is at this point that the trial court, and subsequently TECA, began to confuse the application and enforcement of the secrecy provisions of Rule 6(e). The trial court erroneously found that 98% of the documents used by the Government in preparing its second audit had either never been, or, were no longer, protected by the secrecy provisions of Rule 6(e). In this regard, the trial court noted that apart from the documents obtained by the Government from sources other than the grand jury, some invoices previously presented to the grand jury (approximately 40%) were received into evidence as Exhibits 27 and 53 in the criminal trial of the Petitioners, and as such, were held to be no longer impressed with the grand jury secrecy imposed by Rule 6(e). The predominant volume of documents obtained from the grand jury (approximately 58%) were used by the Government in the criminal trial of Petitioners in preparation for summaries introduced as Government's Exhibits 80 and 81 at the criminal trial pursuant to the provisions of Rule 1006 Federal Rules of Evidence. Exhibits 80 and 81 are each one-page summaries consisting of a two-line chart with Government-compiled figures of four categories of oil and the number of barrels bought and sold. These one-page, two-line summaries are attached hereto as Appendix B (hereafter referred to as the summaries). The actual grand jury documents from which the summaries were prepared were neither offered nor admitted into evidence during the criminal trial, but were present in the courtroom for review by the parties prior to and during the criminal trial.

THE EVIDENCE AND RULINGS BELOW

On or before June 8, 1982, at the request of Sharon Tucker, DOE counsel, Assistant United States Attorney James Schwartz, one of the Government's counsel involved in the criminal prosecution, turned over grand jury documents obtained by the DOJ to DOE personnel. Mr. Schwartz simply filed a *post hoc* notice on June 8, 1982, with Chief Judge H. Dale Cook of the Northern District of Oklahoma, before whom the grand jury had

been impaneled. Mr. Schwartz did not obtain court authorization after a showing of particularized need as required by Fed. R. Crim. P. 6(e). The notice stated:

> "This is to inform you that pursuant to the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, disclosure of material subpoenaed by the grand jury presently sitting in session in the Northern District of Oklahoma is being made to the following additional named persons: Sharon Tucker - Department of Energy attorney; Star Gee - Department of Energy auditor; James Laughlin - Department of Energy auditor; Gerald Coster - Department of Energy auditor; Jim Pohl - Department of Energy auditor; Lynn McDaniel - Department of Energy auditor."

On July 15, 1983, after the DOE informed Mr. Schwartz of additional employees who had access to grand jury materials Schwartz filed a second notice with Chief Judge H. Dale Cook:

> "This is to inform you that pursuant to the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, disclosure of materials subpoenaed by the immediate past grand jury which was sitting in session in the Northern District of Oklahoma is being made to the following additional named persons: *Department of Energy personnel:* Tom Newkirk, Jerry Weiner, Tom Frey, Kenneth Jones, Nancy Crisman, Judith Mather."

The disclosed documents included Petitioners' crude oil records as well as numerous third party records, which Petitioners did not give permission for disclosure.

After the disclosure to DOE personnel in early June, 1983, James Louthan, who was among the first group to obtain access to the grand jury materials, directed a comprehensive audit of Petitioners' crude oil purchases and sales transactions based upon the grand jury documents obtained from Mr. Schwartz. Louthan marshalled over twenty (20) people who spent 15,000 to 20,000 man-hours on the audit.

On October 5, 1982, after the audit was virtually complete, the DOE filed an *ex parte* motion and brief requesting an order of the court "confirming" the DOE's authority to use the grand jury documents in civil enforcement proceedings. On the same date, Chief Judge H. Dale Cook granted Plaintiff's *ex parte* motion. Defendants had no knowledge of the motion or opportunity to object to release of the grand jury records.

RULINGS BELOW

Writing for the TECA majority, the Honorable Leslie E. Brown affirmed that the Government utilized a large number of documents obtained in violation of Fed. R. Crim. P. 6(e) as construed in *United States v. Sells Engineering, Inc., supra.* TECA affirmed the District Court's suppression at trial of two percent (2%) of the documents utilized in the Government's second audit. Of the remaining ninety-eight percent (98%) of the documents used in the preparation of the audit and presentation of the Government's case, forty percent (40%) of the documents were attributable to Exhibits 27 and 53 at the criminal trial. These Exhibits, TECA ruled, became matters of public record when they were received, without qualification, in the criminal trial. The remaining fifty-eight percent (58%) of the documents were extracted from those documents illegally procured by the DOE from the criminal grand jury and incorporated in part into the summaries at the criminal trial. During the criminal trial, the summaries were admitted into evidence under Fed. R. Evid. 1006. However, the actual documents themselves were not introduced or otherwise made public during the criminal trial. Items of information contained in those documents that were critical to the restitution award, namely, the prices of various transactions, were not introduced or made public during the criminal proceedings.

Prior to the civil trial, the Government amended its Complaint by dropping its claim for civil penalties authorized by the EPAA, but retained its claim for a penalty not authorized by any statute. It labeled its claim "restitution". After the Government dropped its claim for civil penalties, the trial court struck Petitioners' demand for a jury trial. By its June 11, 1986 opinion, TECA determined

that the Government's claim was not a claim for penalty and, therefore, denied Petitioners of a jury trial. Petitioners' assertion that the Government's claim was barred by the applicable statute of limitations, collateral estoppel and double jeopardy was found to be without merit by TECA. Additionally, the TECA majority opinion concluded that Sutton was personally liable on a tortious conduct liability theory, and erroneously ruled that the tort cause against him did not give rise to a right to trial by jury.

The TECA opinion, written by The Honorable Leslie E. Brown with The Honorable Reynaldo G. Garza concurring, contains a written dissenting opinion by The Honorable Sam C. Pointer, Jr. Judge Pointer's dissent recommended compliance with this Court's decision in *Sells* and that this case be remanded to the district court for recalculation of the amount of the award to the Government, suppressing approximately sixty percent (60%) of those docments procured by the Government in violaton of Rule 6(e).

REASONS FOR GRANTING WRIT

I. TECA has refused to enforce this Court's ruling in *United States v. Sells Engineering, Inc.* regarding the Government's violation of Fed. R. Crim. P. 6(e).

The TECA decision has created confusion in the application and enforcement of Rule 6(e). This confused application and uneven enforcement of Rule 6(e) began when TECA confirmed the district court's ruling that the DOE had obtained the grand jury documents without proper advance authorization. Confusion continued when TECA refused to suppress all of the documents and materials obtained by the Government's violation of Rule 6(e). Refusal to suppress is in direct conflict with this Court's decision in *United States v. Sells Engineering, Inc., supra.* Confused enforcement of the secrecy provisions of Rule 6(e) arose when TECA found exceptions to the violation without the benefit of any proper authority and unsupported by the facts and circumstances of the case.

The TECA ruling has set a dangerous course for Government personnel to follow. The Government must abide by Rule 6(e). TECA provides the Government with an escape from the secrecy obligation of Rule 6(e) and therefore allows for continued abuse and uneven enforcement of the secrecy protection. TECA erroneously affirmed the trial court's determination that the Government's violation of Rule 6(e) was not reckless and systematic. Therefore, not only should the majority of the documents obtained by the Government in violation of 6(e) have been suppressed, TECA should have reversed the trial court's decision not to dismiss the case with prejudice because of the Government's reckless and systematic violation of Rule 6(e).

Because TECA affirmed the trial court's decision that the Government did obtain grand jury materials in violation of Rule 6(e) and has affirmed that the appropriate remedy for such violation is suppression of the materials obtained in violation of Rule 6(e), Petitioners do not need to further argue that the Government violated Rule 6(e) and that suppression is, at the very least, one of the appropriate remedies. Both TECA and the trial court have affirmed the suppression of two percent (2%) of the documents and materials obtained by the Government in violation of Rule 6(e). However, TECA erred by determining that approximately fifty eight percent (58%) of the documents legally obtained were made public record in the criminal trial although such documents were neither offered nor admitted into evidence by any of the parties to the criminal trial. TECA misplaced its reliance on *Midcontinent Broadcast Co. v. North Central Air, Inc.*, 471 F. 2d 357, 359-360 (8th Cir. 1973), a case decided ten years prior to the *Sells* case. *Midcontinent* does not involve a violation of Fed. R. Crim. P. R. 6(e). *Midcontinent* held that summary exhibits provided for in Fed. R. Evid. Rule 1006 may be offered and admitted into evidence although the documents used to prepare such summary exhibits are not offered and admitted into evidence. *Midcontinent* does *not* stand for the proposition that those documents used to prepare summary exhibits pursuant to Rule 1006 which are neither offered nor admitted into evidence are made a part of the record and therefore, public record, by virtue of

the fact that summary exhibits of same were admitted pursuant to Rule 1006. By its misplaced reliance on *Midcontinent,* TECA has added more confusion to the application and enforcement of Rule 6(e).

In the present case, approximately fifty-eight percent (58%) of the documents unlawfully and illegally obtained by the Government in violation of Rule 6(e) were neither offered nor admitted into evidence at any criminal or civil trial. At the criminal trial, the Government used the grand jury documents to prepare the skeletal summaries. These summaries did not include the price per barrel, Petitioners' customer or trading partner, and miscellaneous information necessary for the Government to perform the second audit. These documents were neither offered nor admitted into evidence. The documents were present in the courtroom on the day the summaries were admitted into evidence, but they were not accessable to the public. When the trial court was not in session, the courtroom was locked to prevent access by the public, and FBI agents were present to prevent access to the grand jury documents at other times. After the summaries were introduced into evidence, the supporting documents were returned to the grand jury room and remained physically separated from trial evidence and the trial record. The actual documents were never in the United States District Clerk's office with the trial evidence. In fact, the DOE's chief auditor testified that the DOE originally obtained the documents from the grand jury room. The cursory summaries did not reveal the important contents of the actual documents. The nature of the transactions between the Petitioners and third parties, as recorded in the actual documents, remained secret and protected by Rule 6(e).

In *State of Texas v. United States Steel Corporation,* 546 F. 2d 626 (5th Cir.), *cert. denied,* 434 U.S. 889 (1977), the court determined that even though grand jury testimony of corporate employees had been made available to corporate defendants to aid in their defense in a civil suit, the grand jury's secrecy surrounding the transcripts "remained unaffected." *Id* at 629. The State of Texas sought production of the transcripts, arguing that it did not show a particularized need because the possession by the

corporate defendants of their employees transcripts had already breached grand jury secrecy. The court rejected the State's argument, emphasizing, "[t]he State underrates the importance and misconceives the reasons for the cloak of grand jury secrecy..." *Id* at 629.

In *Pakistan International Airlines v. McDonnell Douglas,* 94 F.R.D. 566 (D.C. Cir. 1982), the court held that the fact that the grand jury had been dissolved and that the requested grand jury testimony had been disclosed to the defendant under Fed. R. Crim. P. 16(a)(1)(A) did not affect the secrecy of the material nor did it obviate the requirement of a showing of a particularized need in order for disclosure of the material. Fed. R. Crim. P. 16 provides for discovery and inspection. Rule 16(a)(1)(A) in part provides:

> Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendent, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

With regard to the discovery and disclosure of documents to a defendant, Rule 16(a)(1)(C) provides:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

In the *United States v. Heinze,* 361 F.Supp. 146, 157 (D. Del. 1973), the court held that the review by a witness of his prior testimony was not a disclosure under Rule 6(e) and that the secrecy protected by Rule 6(e) had not been affected. *See also, In Re: Grand Jury,* 469 F.Supp. 666, 669 (M.D. Pa. 1978); *United States v. American Radiator and Standard Sanitary Corporation,* 45 F.R.D. 477 (M.D. Pa. 1968).

Likewise in this case, access by the Petitioners to copies of documents familiar to them did not make those documents public or breach grand jury secrecy. TECA's opinion that the thousands of documents used compile the two one-page, two-line summaries were public documents because of the documents' availability to Petitioners, ignores this court's decision in *Sells* and makes secrecy under Rule 6(e) meaningless. Such a ruling creates an obvious conflict between Rule 6(e) and Rule 16(a)(1)(A) and (C). The corporate documents in *Sells* were clearly available to the defendants. The Supreme Court nonetheless, determined that grand jury secrecy protected these materials by requiring a court order only after the requesting party showed a particularized need for further disclosure. If grand jury secrecy was destroyed merely as a result of the litigant's access to documents, as allowed by Fed. R. Crim. P. 16(a)(1)(C) the *Sells* defendants, by having access would have had no claims. As TECA Judge Pointer stressed in his dissenting opinion, the *Sells* case requires that, in the case at bar, fifty-eight percent (58%) of the documents used by the Government to prepare their second audit should be suppressed and not used as a basis for the civil judgment. Similarly, mere compliance with *Midcontinent* with regard to the proper admittance of the summaries pursuant to Fed. R. Evid. Rule 1006 should not be considered appropriate authority for disclosure of secret grand jury documents in violation of Fed. R. Crim. P. 6(e). The TECA majority opinion in this case is in clear conflict with this court's decision in *Sells* and creates confusion in the application and enforcement of Rule 6(e). Judge Pointer has properly construed the facts in connection with this Court's decision in *Sells* and voiced his concern over the confusion effecting Rule 6(e), Rule 16(a)(1)(A) and (C) and Fed. R. Evid. 1006 that has been wrought by the majority opinion.

Because of the Government's reckless and systematic violation of Rule 6(e), dismissal of the cause was justified. In *United States of America v. Kilpatrick, No.* 82-CR-222, slip opinion (D. Colo. 1984), the court concluded that "where Rule 6(e) is violated recklessly and systematically, dismissal is appropriate." In *Kilpatrick,* the court noted that IRS agency representatives determined to whom disclosure of grand jury material should be made and that notices to the district court "were prepared in some instances substantially after such disclosure." *Id.* The Court concluded that such behavior was reckless and systematic. As stated, "[t]he extensive disclosure of grand jury materials to IRS civil employees, the haphazard and *post hoc* method of identifying those to whom disclosure was made and the omission from the disclosure notices of numerous IRS employees privy to grand jury information clearly contravened the Rule." *Id.* The court dismissed the case.

In this case, the Government blatantly violated Rule 6(e) as "recklessly and systematically" as the IRS agency personnel violated Rule 6(e) in *Kilpatrick.* As in *Kilpatrick,* the evidence clearly supports the conclusion that grand jury materials were extensively disclosed to DOE civil employees and that the method of identifying employees, if at all, was haphazard and *post hoc.* Dismissal is an appropriate remedy.

Not only were the documents revealed without proper court authorization to the twelve (12) DOE civil agency personnel listed in the notices, but after illegally obtaining the documents, the DOE disseminated the grand jury records throughout the Department of Energy offices, including the Office of Special Investigations as well as to IRS agency personnel, in complete and blatant disregard of Rule 6(e). The DOE's chief auditor testified that, although he knew the documents were sensitive, the grand jury documents obtained by the DOE from the Tulsa, Oklahoma, grand jury room were copied and distributed to the Tulsa, Dallas, Houston and New Orleans DOE offices. A DOE employee under the supervision of the DOE's chief auditor, testified that no limits were placed on the number of DOE personnel who could gain access to the grand jury materials nor were limitations placed upon the

materials that could be reviewed by those persons. Once the DOE Houston office obtained the subject documents, the procedures for verifying access and emphasizing confidentiality of the documents were lax or non-existent. In Houston, incomplete records were kept of the names of auditors reviewing the documents. The DOJ attorney, Mr. Schwartz, who released the records was never provided the names of additional persons given access to the grand jury records. These records were also given to other auditors throughout the DOE who reviewed these records in an effort to pursue audits of third parties without giving these other personnel unrelated to the present case any precautionary instructions related to reviewing these documents. These documents were subsequently copied, without limitations, and distributed throughout the DOE for work-up and audit of other companies unrelated to the present case.

Moreover, the DOE employed the services of J. D. Young Company to copy fifty percent (50%) of the grand jury documents which it had obtained from the Tulsa grand jury room. The Young Company employees were not informed that they were copying grand jury documents and no record was maintained of those company employees engaged in the copying process.

In fact, one employee of the DOE, Gary Allen, refused to copy grand jury documents when asked to do so, stating that the DOE "didn't have a right" to copy the grand jury documents. Despite his concern, he was directed by the supervisors in the DOE Tulsa office to copy the documents. Gerald Koester stated that no further inquiries were made regarding to Mr. Allen's concern that the DOE had no authority to copy the grand jury documents.

In the face of this cavalier distribution and copying of grand jury materials, both DOE and DOJ personnel were aware that DOE personnel could not obtain the grand jury materials at issue here for use in a civil case until *after,* not before, a district court authorized disclosure of those materials. Internal DOE memoranda and the U.S. Attorney Manual used by the DOJ attorneys demonstrate such awareness. In a March 22, 1982 memorandum from Sharon Tucker, a DOE lawyer, to her supervisor, Milton Lorenz, Miss Tucker wrote:

> "The civil audit requires that the DOE obtain access to all BPM existing records as well as the records of all BPM suppliers and purchasers immediately... We recommend that DOE immediately approach DOJ officials concerning the possibility of seeking to obtain now, prior to the trial date, the records we need to perform a complete audit *by requesting a 6(e) order permitting our access under the Federal Rules of Criminal Procedure.* [Emphasis added]

In a May 28, 1982, memorandum to supervisor Robert Heiss, Sharon Tucker related a telephone conversation with Robert Ogren of the Fraud Section of the DOJ, commenting:

> "I reiterated that since DOE needed all BPM related records in order to proceed with the civil case, we may need to consider seeking [Rule] 6(e) order."

The U.S. Attorney Manual dated August 17, 1978, used by the DOJ attorneys, including James Schwartz, the DOJ attorney who ignored Rule 6(e) and disclosed the grand jury materials to the DOE, states in Section 9-11.363 that Rule 6(e) authorizes disclosure of matters occurring before the grand jury only when authorized by the order of the District Court that impaneled the grand jury. The U.S. Attorney Manual dated February 16, 1982, continued, "It is clear that Rule 6(e) does not authorize disclosure to attorneys for other federal government agencies" for use in civil proceedings.

The trial court concluded, and TECA affirmed, that the violation of Rule 6(e) was not egregious because James Schwartz was relying upon a court order by Judge James Ellison in which the court held documents not to be subject to Rule 6(e). *See, In Re Special Grand Jury,* Misc. No. 522 (N.D. Okla., October 8, 1981). Assuming arguendo that the documents were not subject to Rule 6(e), the DOJ attorney's manual itself states that a court order is required before making documents public:

> "The most commonly denied request for grand jury documents are requests for the disclosure of or access to

> all the documents subpoenaed by a particular grand jury or a list or inventory of all such documents. . . While Rule 6(e) ordinarily does not apply to the release of documents subpoenaed to the grand jury, a court order nevertheless is required for their public disclosure. *Such documents have been held to remain the property of the person from whom they were subpoenaed, with a grand jury merely having taken temporary custody. Where the owner of the documents does not consent to their release, disclosure must be court authorized. See Section 9-11.365, 366."* [Emphasis added.]

With regard to James Schwartz' reliance on Judge Ellison's order, it is important to note that the Government took the position in the case before Judge Ellison that the documents were in fact subject to grand jury secrecy. *See, In Re: Special Grand Jury, supra.* Moreover, although the court disagreed with the Government's position, it refused to release the documents at issue without the consent of the owners. *Id.*

Unless this court enforces its decision in *Sells* and erases the confusion caused by the TECA decision regarding Rule 6(e), this Court's decision in *Sells* and the misapplication and uneven enforcement of grand jury secrecy will continue. The TECA decision provides the Government with the opportunity and authorization to disregard the correct procedure in the future and ignore grand jury secrecy, which allow Government agencies to circumvent the civil discovery procedure, to rummage through grand jury documents, to compile evidence for civil cases after extensive review and investigation of grand jury documents. Here, the result of the Government's gross misconduct was a shallow reprimand. Rule 6(e) secrecy was totally ignored and will continue to be ignored if the TECA decision is not reviewed. The deterent value of Rule 6(e) stands to be emasculated and grand jury secrecy to become a memory as a result of the TECA opinion. Dismissal of this entire cause is justified by the Government's reckless conduct in this case.

II. Because the Government's claim was one for penalty and not restitution, this case should be dismissed.

A. TECA has erred in affirming the theory of restitution.

Only the trial court below, affirmed by TECA on appeal, have ever awarded restitution to the Government for miscertifications alone. Not other court in the United States has made such an award. At the same time that the trial court stated that the judgment against Petitioners for miscertifications was "restitution. . .not. . .a penalty," the Court acknowledged that the Government did not prove that Petitioners' pricing practices were contrary to the guidelines of the regulations. In other words, the Government did not prove that Petitioners overcharged their purchasers.

"Restitution" for miscertifications is a contradiction in terms if the miscertifier did not overcharge its purchasers because restitution is intended "to make the victims whole. . ." *Citronelle-Mobile Gathering, Inc. v. Edwards,* 669 F.2d 717 (Temp. Emer. Ct. App.) *cert. denied,* 459 U.S. 877 (1982). The trial court and TECA relied upon *Citronelle-Mobile Gathering, Inc. v. Edwards; Sauder v. Department of Energy,* 648 F.2d 1341 (Temp. Emer. Ct. App. 1981), *Getty Oil Company v. Department of Energy,* 569 F.2d Supp. 1204, 1217-18 (D. Del. 1983); appealed on other grounds, No. 3-37 (TECA October 19, 1983); and *United States v. Exxon,* 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), *cert. den.,* _____ U.S. _____ (January 27, 1986); *rehearing denied,* _____ U.S. _____ (April 7, 1986) for the proposition that restitution to the Government for a violation of the miscertification regulations is appropriate. *Getty, Exxon* and *Citronelle* are distinguished because the violations were for violation of *pricing* regulations, not miscertification as in this case.

In *Exxon,* the restitution had a direct relationship to Exxon's overcharges. Exxon was not disgorged of all gross profit for miscertifying, it was only disgorged of that profit received which had a relationship to pricing overcharges. Likewise, in *Citronelle* and *Getty,* the courts concluded that restitution was appropriate relief for *pricing overcharge. 669 F.2d at 721; 569 F.Supp. at 1217. In Sauder v. Department of Energy, supra,* at 1348, the court referred to "restoring the status quo" by refunding to Mobile

the *amount by which Mobile was overcharged.* It is important to note each of these cases are completely void of any reference to Section 212.131. The Government based its restitution claim on 12 U.S.C. §1904, note 209 which permits restitution of "monies received" in violation of agency regulations. The court allowed restitution in the context of overcharges, "money received" in violation of the regulations. In the present case, there is no statutory authority for restitution for a miscertification violation. Section 212.131 is nothing more than a recordkeeping requirement which provides for civil penalties only and not restitution. The Government dropped its claim for civil penalties one month prior to trial in order to avoid its claim being barred by the statute of limitations and because it saw an opportunity to try to deny Petitioners a jury trial.

To obtain restitution, the Government must demonstrate not only unjust enrichment to the Petitioners, but also injury to third parties. *See, Citronelle-Mobile Gathering, Inc. v. Edwards, supra.* Here, the Government never proved that the Petitioners were unjustly enriched (because the Government could not demonstrate that Petitioners overcharged their customers) and the Government never proved that Petitioners' business practices injured third parties.

Although TECA relied upon its rulings in *Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* and other cases decided under price control programs similar to those imposed by the Emergency Stabilization Act (hereafter referred to as ESA) and the Emergency Petroleum Allocation Act (hereafter referred to as EPAA), it has distorted the principle of restitution. The remedy allowed here was not restitutional but penal. Judge Pointer, in his dissent, acknowledged this distortion in a long line of other TECA cases. Without review by this Court, TECA will continue to intensify the distortion and allow the Government a restitutionary remedy without the necessity of proving the mandatory and fundamental elements of the theory of restitution. Without these elements, the Government did not have a *prima facie* case in restitution and should not have recovered a judgment.

Because the Government failed to obtain a monetary judgment in the criminal trial, the Government filed the civil claim seeking the same penalty but masking the penalty claim in the guise of "restitution". The TECA majority adopted the Government's argument that gross misconduct gave rise to restitution despite the absence of unjust enrichment and injury to third parties. The Fifth Amendment to the United States Constitution provides that no one shall be placed twice in jeopardy for their liberty and property. Petitioners' prior charges under RICO allowed jeopardy to attach. The Government, under the Fifth Amendment to the United States Constitution is prevented from pursuing Petitioners in the civil action.

B. As the Government's claim is a penalty claim, TECA erred in denying Petitioners a jury trail.

In its Second Amended Complaint, the Government dropped its claim for civil penalties authorized by the EPAA, but retained its claim for a penalty not authorized by a statute. It labelled this claim "restitution." This label is misleading.

"The right to a jury trial is to be determined from the pleadings, the label put on a claim in the pleadings is not decisive. The court must consider the nature of the issues in the case regardless of what they have been called by the pleader." C. Wright and A. Miller, *Federal Practice and Procedure,* Section 2304 (citing *Dairy Queen v. Wood,* 369 U.S. 469, 477-478 (1962). Thus, TECA's uncritical acceptance of the Government's characterization of its claim as "restituion" was erroneous. The Government's claim is penal; such claims are legal rather than equitable and carry an attendant right of jury trial. *Porter v. Warner Holding Company,* 328 U.S. 395, 401-402 (1946); *United States v. Hart,* 86 F.Supp. 787 (E.D. Va. 1949).

In *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Company, Inc.,* 90 F.R.D. 313 (E.D. N.Y. 1981), the Government was mistaken in its belief that restitution is limited to equity and that no jury trial is available where restitution is sought. *Id.* at 322. Restitution developed in courts of law and equity prior to the

ratification of the Seventh Amendment to the United States Constitution in 1789. *Restatement of Restitution,* at pages 5-10; G. Palmer, *Law of Restitution,* Section 1.1 (1978). "At law the principle remedy is quasi-contract, leading to a money judgment. . . In equity the principle remedy is constructive trust. . ." *Id.* To the extent that the Government's claim for restitution in this case seeks the recovery of alleged overcharges by the Corporate Petitioners, it is a quasi-contract claim for damages which is legal in nature. The Government's prayer for a money judgment instead of a constructive trust, equitable lien, or accounting, confirms the restitution claim is not equitable in nature. Therefore, the Seventh Amendment guarantee of right to trial by jury was denied Petitioners on the restitution issue. *Curtis v. Loether,* 414 U.S. 189 (1974); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Company, Inc., supra* (corporate defendant held entitled to jury trial on restitution issue); C. Wright and A. Miller, §2316 ("If a new statutory claim, unknown to the common law, is created and Congress is silent on jury trial, there is a right of jury trial if the action is found to be analogous to an action at common law.")

Moreover, the Government sought and obtained, and TECA confirmed, a personal liability judgment against Sutton, individually, as the President and sole stockholder of the Corporate Petitioners under a "tortious conduct liability theory." This judgment appears to rest on two theories: (1) that Sutton was the alter ego of each of the Corporate Petitioners; and (2) that Sutton authorized, or participated in, the miscertifications which the Corporate Petitioners purportedly committed. Since Section 5(a)(4) of the EPAA (15 U.S.C. §754(a)(4) provides the exclusive remedy for knowing and willful violations of the Act by corporate officers, directors and agents, alter ego and tortious conduct, liability is precluded thereby.

Furthermore, personal liability for conduct in violation of the EPAA is authorized by Section 5(a)(4) of the Act and the remedy of civil penalties is provided by Section 5(a)(3) thereof. Despite the obvious availability and applicability of Section 5(a)(4) and the circumstances of this case, the Government chose to forego the federal statutory remedy in favor of a common law remedy which it

had never raised in any of the complaints filed. Despite Petitioners objections, the trial court adopted, and TECA confirmed, the Government's unplead theory of alter ego and found Sutton personally liable for the Corporate Petitioners' alleged mis-certifications. Since the remedy of "piercing the corporate veil" is not authorized by the EPAA, TECA erred in applying it as a rule of decision. The court cannot avoid the facts that the regulatory scheme embodied in the ESA and the EPAA is comprehensive and novel. Both acts provide civil penalties for violations by individuals, and neither statute authorizes the application of the alter ego doctrine to pierce the corporate veil.

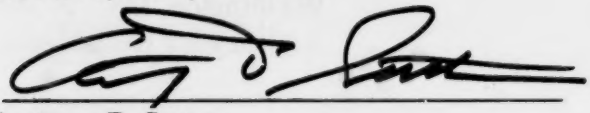
Personal liability based on tortious conduct is precluded by the clear provisions for individual liability contained in the EPAA. The civil penalties promulgated by Congress for such unlawful conduct must not be supplanted by a judicial remedy which has never been authorized by Congress.

A claim based upon tortious conduct liability is a legal (tort) claim which carries with it an attendant right of jury trial. The Government's claim is in the nature of a penalty, and is founded upon 5(a)(4) of the EPAA providing for civil penalties against corporate officers and directors for tortious conduct, therefore Sutton was entitled to a jury trial in order to determine individual liability.

CONCLUSION

Petitioners are entitled to a Writ of Certiorari due to the Temporary Emergency Court of Appeals total disregard of this court's decision in the *Sells* case and in total disregard of the strict constitutional protectional requirements of Federal Rules for Criminal Procedure 6(e) and due to TECA's disregard of the Fifth and Seventh Amendments to the United States Constitution providing for protection from double jeopardy and right to a jury trial, respectively.

ROBERT B. SUTTON, SUTTON INVESTMENTS, INC., BPM, LTD., and SOONER REFINING COMPANY, INC., PRO SE

By 

Anthony P. Sutton
Oklahoma Bar Association #8781
Attorney at Law
4835 South Peoria, Suite 25
Tulsa, Oklahoma, 74105
(918) 749-5815
Attorney for Petitioners, *pro bono*

Of Counsel:

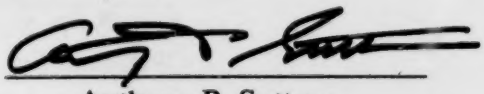
Mildred E. Otey
Oklahoma Bar Association #6810
2761 East Skelly Drive, Suite 700
Tulsa, Oklahoma 74105
(918) 743-6201
Attorney for Petitioners, *pro bono*

Sam P. Daniel III
Oklahoma Bar Association #2151
Short, Harris, Turner & Daniel
2761 East Skelly Drive, Suite 700
Tulsa, Oklahoma74105
(918) 743-6201
Attorney for Petitioners, *pro bono*

CERTIFICATE OF MAILING

I, Anthony P. Sutton, do hereby certify that on the 28th day of August, 1986, that I mailed, by certified mail, return receipt requested, three and correct copies of the foregoing Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States, with proper postage prepaid to:

Mr. Thomas C. Newkirk
Economic Regulatory Administration
Room 6H-025
Forrestal Building
1000 Independence Ave. S.W.
Washington, D.C. 20585
Attorney for Respondent



Anthony P. Sutton

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROBERT B. SUTTON, SUTTON INVESTMENTS, INC., SCURRY OIL COMPANY, BPM, LTD., AND SOONER REFINING COMPANY, INC.

PETITIONERS,

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT.

APPENDIX A

ANTHONY P. SUTTON
Oklahoma Bar Association #8781
Attorney at Law
4835 South Peoria, Suite 25
(918) 749-5815
Attorney for Petitioners, *pro bono*

SAM P. DANIEL III
Oklahoma Bar Association #2151
Short, Harris, Turner & Daniel
2761 E. Skelly Drive, Suite 700
Tulsa, Oklahoma 74105
(918) 743-6201
Attorney for Petitioners, *pro bono*

MILDRED E. OTEY
Oklahoma Bar Association #6810
2761 East Skelly Drive, Suite 700
Tulsa, Oklahoma 74105
(918)743-6201
Attorney for Petitioners, *pro bono*

Temporary Emergency Court of Appeals of the United States

Nos. 10-57 and 10-58

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE AND CROSS-APPELLANT.

v.

ROBERT B. SUTTON, SUTTON INVESTMENTS, INC.,
SCURRY OIL COMPANY, BPM, LTD., and
SOONER REFINING COMPANY, INC.,
DEFENDANTS-APPELLANTS, AND CROSS-APPELLEES.

On Appeal from the United States District Court
for the Northern District of Oklahoma
(No. 82-C-1069-B)

(Argued: October 21, 1985 Decided: June 11, 1986)

GEORGE W. BRAMBLETT, JR., CHARLES C. FREDERIKSEN, Eliot D. Shavin, Sharon N. Freytag of Haynes & Boone, Dallas, Texas, Attorneys for Appellant Corporate Defendants;

Michael B. Lansden, Baton Rouge, Louisiana, Attorney for Appellant Robert B. Sutton;

THOMAS C. NEWKIRK, Larry P. Ellsworth, Floyd I. Robinson, Marcia K. Sowles, Beth N. Mizuno, Rodney L. Solenberger, Patricia D. Graham, Erich T. Schwartz, of the Economic Regulatory Administration, Department of Energy, Washington, D.C., for Appellee, United States of America;

Harold E. Kohn, Joseph C. Kohn, Kohn, Savett, Marion & Graf, P.C., Philadelphia, Pennsylvania, Attorneys for Amicus Curiae Philadelphia Electric Company;

Philip P. Kalodner, Philadelphia, Pa., Attorney for Amicus Curiae National Freight, Inc., RJG Cab Inc., and Geraldine H. Sweeney;

Alphonse M. Alfano, Robert S. Bassman, Douglas B. Mitchell, Bassman, Mitchell & Alfano, Washington, D.C., Attorneys for Amici Curiae, the Petroleum Marketers Association of America and the Jobbers' Group;

James F. Flug, Paula Dinerstein, Lobel, Novins & Lamont, Washington, D.C., Attorneys for Amicus Curiae, the States of Alabama, California, Connecticut, Idaho, Illinois, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, Vermont, Wisconsin, Wyoming, and New York;

Irwin I. Kimmelman, Attorney General of New Jersey, Newark, New Jersey, and Jim Mattox, Attorney General of Texas, Austin, Texas, Attorneys for Amici Curiae "The Interested States."

Before REYNALDO G. GARZA, WESLEY E. BROWN, and SAM C. POINTER, JR., Judges.

WESLEY E. BROWN, Judge.

These appeals arise from an action for restitution filed in the Northern District of Oklahoma by the United States against defendant appellants Robert B. Sutton, Sutton Investments, Inc., BPM, Limited, Scurry Oil Company and Sooner Refining Company, pursuant to the provisions of Section 209 of the Economic Stabilization Act ("ESA"), as amended, 12 U.S.C. Sec. 1904 note, as incorporated in Section 5(a)(1) of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. Sec. 754 (a)(1).[1] The government alleged that the defendants,

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* Judge Pointer filed an opinion, attached hereto, concurring in part and dissenting in part.

[1] The United States initially sought civil penalties under Section 208(b) of the Act as well as restitution, but dropped this claim prior to trial.

as resellers of crude oil, had, during the period of May, 1976 through January, 1981, miscertified their crude oil sales in violation of the provisions of 10 C.F.R. Secs. 212.131, 210.62(c), and 205.202.

Following a seven week trial before a magistrate and the district court, sitting without a jury, the trial court found that defendants had committed the miscertifications alleged and entered judgment against all defendants, jointly and severally for $423,050,902.92 in restitution to be paid to the United States for distribution to the states for use in energy related programs.[2] Although Robert Sutton acted in the names of the corporate defendants, the trial court held him to be jointly and severally liable with his corporations because the corporations were merely Sutton's alter egos. In addition, the court found that Sutton himself had engaged in tortious conduct, since he personally caused, or directed the illegal miscertifications.

Defendants appeal the trial court's finding of liability, and the amount of the award of restitution. In addition, they contend that the court erred in refusing to suppress all documents obtained by the government from a grand jury, allegedly in violation of Rule 6(e), Fed. R. Crim. Procedure. Defendants contend that the award to the government was in the nature of a penalty and not restitution, and as such it was barred by the statute of limitations and the doctrines of collateral estoppel and double jeopardy. Defendants also claim that the penalty nature of the claim entitled them to trial by jury, they claim that the certification regulations in question were invalid, and that the one-house legislative veto provisions

[2] The judgment of $423,050,902.92 included $210,736,532.92 in restitution and $212,314,369.00 in interest accumulated through August 31, 1984, plus interest of $132,315.97 per day for each day after August 31, 1984, through the date of Judgment, September 14, 1984, plus interest at 11.98% on the total judgment thereafter, pursuant to 28 U.S.C. Sec. 1961.

of the EPAA and EPCA preclude the government's reliance on this legislation.

The United States has cross-appealed on two limited issues. The government claims that the district court erred in reducing the restitution award by excluding overcharges proved through use of certain documents obtained from a grand jury following Sutton's criminal trial in 1982, and by setting off Sutton's losses on some crude oil trades, against the total amount of overcharges.

By leave of court the Philadelphia Electric Company, National Freight, Inc., RJG Cab, Inc., Geraldine H. Sweeney, the Petroleum Marketers Association of America, the Jobbers' Group, and various States of the United States, have appeared as Amici Curiae. These parties have filed briefs presenting differing views as to the appropriate distribution of the restitution funds, without taking any position as to defendants' liability.

I. *The Chadha Issue*

Defendants have preserved their claim, previously raised in a Motion for Summary Judgment, that the EPCA and the EPAA contain unconstitutional legislative veto provisions, under the ruling in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 77 L.Ed.2d 317 (1983). Although defendants are aware of this court's decision reported as *Exxon Corp. v. United States Dept. of Energy*, 744 F.2d 98 (TECA 1984), *cert. denied*, 105 S.Ct. 576, they present the issue in this appeal "as there has been no definitive statement by the United States Supreme Court on this issue." The history of the veto provisions which appear within the Economic Stabilization Act of 1970, as well as Section 551, Section 552 of the Energy Policy and Conservation Act, 42 U.S.C. Sec. 6201, note, and our analysis of these provisions in terms of *Chadha*, have been discussed in the *Exxon* case and will not be repeated at this point. We

find that we have jurisdiction of this appeal, and ... the *Chadha* decision has no effect on any of the issues presented to us in this litigation.

II. *Criminal Proceedings*

Because of the nature of defendants' claim that the trial court erred in refusing to suppress all documents obtained by the government from the grand jury which returned a criminal indictment against defendants, it is necessary to review in some detail the criminal prosecution and pretrial matters pertaining to the civil litigation which is the subject matter of this appeal.

In October, 1981, a grand jury in the Northern District of Oklahoma returned a 17-count indictment against Robert B. Sutton, BPM, Ltd., and the Scurry Oil Company. The first 15 counts of this indictment were based upon the allegation that defendants were engaged in a fraud scheme whereby approximately 240 million barrels of crude oil were falsely certified under federal Mandatory Price Regulations. Counts 1, 2, and 3 charged violations of the anti-racketeering statutes; Counts 4 through 15 charged violations of the mail and wire fraud statutes; Count 16 alleged obstruction of justice in violation of 18 U.S.C. Sec. 1505 for attempting to destroy subpoenaed records, and Count 17 charged conspiracy to obstruct justice in violation of 18 U.S.C. Sec. 371 for attempting to prevent witnesses from testifying. At the close of the prosecution's evidence, the trial court found that the government had failed to meet its burden of proof on the first 15 counts, and a judgment of acquittal was entered on all of these counts. Upon application by the United States, a writ of mandamus staying entry of the judgment of acquittal was first granted by a three judge panel, *United States v. Ellison*, 684 F.2d 664, and then denied *en banc*, 722 F.2d 595 (10 Cir. 1982).

Following remand by the Circuit, trial on the remaining Counts 16 and 17 continued. The jury found defendant Robert B. Sutton guilty on Count 17—conspiracy to obstruct justice, but could not reach a verdict on Count 16. A mistrial was declared on that count, and a few weeks later Sutton was retried and convicted on Count 16. *United States v. Sutton*, 732 F.2d 1483 (10 Cir. 1984). Count 16 grew out of the destruction of BPM corporate records, after they had been subpoenaed in 1978 by the Department of Energy which was conducting an audit of defendants' business activities. The evidence at the criminal trial established that after the subpoena was served, Robert Sutton ordered all of his company records to be collected and moved into storage in Crowley, Louisiana. Shortly thereafter, all of these records were destroyed—by vandals—according to Sutton.[3] When Sutton learned one box of records had not been moved into storage, he ordered Gaylord Simon, a BPM employee to destroy it. Simon did not do so—he gave the box to Jack Clothier, Sutton's former business associate, and Clothier's attorney, William Lambert later surrendered the box in response to a grand jury subpoena. *United States v. Sutton, supra*, 732 F.2d at 1487-1488. This box, sometimes referred to as "The Box", and its contents of BPM invoices covering transactions of 1976 to 1978, were admitted as Exhibit 53 in the

[3] In entering judgment for restitution in the instant case the trial court found that defendants, "through Robert B. Sutton attempted to destroy or cause to be destroyed certain of their books and records;" that Sutton "stated to his employees that the company's stored crude oil reseller records had been destroyed by either fire, flood and/or vandalism;" and that there "was no independent evidence offered such as photographs or insurance claims, etc. to corroborate the purported fire, flood, or vandalism." The trial court further found that the evidence "supports the conclusion that Robert B. Sutton personally saw to it that most of the defendants' crude oil reseller relevant records were destroyed or secreted." Findings of Fact (F/F) Nos. 29, 30, R. 26123).

criminal trial, and as Exhibit PX1A in this restitution case. It has been previously determined that this box was properly authenticated and admitted into evidence at the criminal trial under the provisions of Rule 901(a) Fed. R. Evid. *United States v. Sutton, supra,* 732 F.2d at 1490.

The evidence on Count 17—conspiracy to obstruct justice—included taped conversations between Robert Sutton and one Carlos Marcello in which Sutton stated that he wanted Marcello to prevent Lambert and Clothier from talking to the F.B.I. To prove motive, the government offered testimony that Sutton "had bought oil for which there was a ceiling price and sold it as oil for which there was no ceiling price." *United States v. Sutton, supra,* 732 F.2d at 1488.

III. *The Grand Jury Documents. Rule 6(e) Fed. R. Crim. Proc.*

Prior to institution of any criminal proceedings against Sutton and his companies, the Department of Energy attempted to investigate its suspicion that the defendant corporations, as crude oil resellers, had improperly certified crude oil which it had resold during the late 1970's. For this purpose, various administrative subpoenas were issued in an attempt to obtain defendants' records. When the grand jury investigation began in Oklahoma the administrative investigation was abandoned. Shortly after Robert Sutton was found guilty on Count 17 of the indictment on May 27, 1982, Assistant United States Attorney, James Swartz, one of the government's counsel in the criminal prosecution, addressed a letter under date of June 8, 1982, to Chief Judge H. Dale Cook of the United States District Court, Northern District of Oklahoma:

> This is to inform you that pursuant to the provisions of Rule 6(e) of the Federal Rules of Criminal

> Procedure, disclosure of materials subpoenaed by the grand jury presently sitting in session in the Northern District of Oklahoma is being made to the following additional named persons:
>
> (Then followed the names of one attorney and five auditors for the Department of Energy)

On July 15, 1982, a second letter was sent to Judge Cook advising that disclosure of materials subpoenaed by the grand jury was being made to six additional employees of the Department of Energy.

On October 5, 1982, the government filed what it terms an "Ex Parte Motion to Utilize in Civil Proceedings Documents Obtained by the Grand Jury." In discussing its particularized need for the grand jury material, the government made these allegations in this motion (R. 23,419):

> Documents collected during the course of the Grand Jury investigation are relevant to on-going investigations being conducted by the DOE pursuant to its civil enforcement authority. Copies of the documents have been provided to DOE agents as reflected in letters filed with the court pursuant to Federal Rule of Criminal Procedure 6(e). By this motion the Government seeks a formal order from the Court confirming the Department's authority to utilize these documents in civil enforcement proceedings. In accordance with the general rule of Grand Jury secrecy this motion is made ex parte and accompanied by the motion to seal, and the proposed form or order granting the motion provides that it and the moving papers shall remain under seal until further order of the Court.

In effect, the ex parte motion sought confirmation of the use of the documents in these present civil enforcement proceedings, actual access having been obtained four months earlier. On October 5, 1982, Judge Cook granted the government's motion, and directed that the grand jury documents otherwise remain under seal.

The United States then filed this civil action for restitution on November 9, 1982, claiming that defendants had violated the price regulations by miscertifying or failing to certify over 177 million barrels of crude oil, resulting in violations totalling more than $700 million. The defendants immediately moved to suppress documentary evidence used by the government in preparing the audit which was the basis of the action, claiming that DOE civil enforcement personnel had improperly gained access to the documents in violation of grand jury secrecy requirements of Rule 6(e) Fed. R. Crim. Procedure. The general rule of secrecy is set out in Rule 6(e)(2) which provides that parties to the proceedings, including attorneys for the government, shall not disclose matters except as provided by the rules, but that no obligation of secrecy may be imposed on any persons except in accordance with the rule. Any knowing violation of Rule 6 may be punished as a contempt of court.

The exceptions to secrecy requirements are set out in Rule 6(e)(3):

> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> > (i) an attorney for the government for use in the performance of such attorney's duty; and
> >
> > (ii) such government personnel . . . as are deemed necessary by an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.
>
> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, be-

fore which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, ...

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

* * * *

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

In an order of January 7, 1983 (R. 23,416) overruling defendants' motion to suppress, the trial court found that material which was made available during the criminal trial was no longer subject to Rule 6(e) secrecy provisions, and would therefore be admissible in civil litigation. As to other material procured from the grand jury, the court determined that the United States Attorney had no authority in June and July, 1982, to turn over grand jury material to DOE civilian enforcement personnel without obtaining a prior court order. However, although a violation of grand jury secrecy was found, the trial court believed that the government had acted in good faith and that the disclosure was not so "egregious" as to require suppression of the evidence. A decision on an appropriate sanction was then reserved for future decision.

Following the decision of the Supreme Court in *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 77 L.Ed. 2d 743, 103 S.Ct. 3133 (1983), defendants renewed their motion to suppress the questioned grand jury material. From supplementary evidence added to the record, the trial court was able to find that 98% of the documents used by the government in preparing its civil restitution

case had never been, or were no longer, protected by the secrecy provisions of Rule 6(e). Order of October 31, 1983, R. 24-255. In this respect, the court noted that apart from documents obtained by the government from sources other than the grand jury, some invoices previously presented to the grand jury were received in evidence as Exhibits 27 and 53 in the criminal trial of Robert B. Sutton, and as such, were no longer impressed with grand jury secrecy. Another large volume of documents obtained from the grand jury was used to reconstruct BPM records which had been destroyed, and these documents were used to prepare summaries of these records. These summaries were introduced as plaintiff's exhibits 80 and 81 at the criminal trial of Robert Sutton, pursuant to the provisions of Rule 1006, Fed. Rules of Evidence.[4] These documents, although not admitted as exhibits during the criminal trial, were present in the courtroom for further examination in relation to admission of the summary exhibits, and they were produced and made available to defendants prior to commencement of the criminal trial. Under these circumstances, the trial court found that the reconstructed records of BPM were no longer impressed with secrecy because they had been produced at the criminal trial and had been used in preparing the summary exhibits which reflected and summed up the contents of all of these documents. The court also determined that while the remaining 2% of the documents used by the government in preparing its civil action remained subject to Rule 6(e) secrecy requirements, the evidence established that the government

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[4] Federal Rule 1006 provides that:

> "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court."

had acted in good faith and in reliance on existing case law which was subsequently overruled by the *Sells* decision.[6] The trial court again reserved judgment on the question of sanctions against the government until a later date. Order of October 31, 1983, *supra*, at R. 24,259.

On May 7, 1984, the first day of trial in this civil litigation, the trial court laid out the ground rules for admission of documentary evidence, including the Rule 6(e) grand jury materials:

> Concerning the documents that the Court has determined were obtained by the government in violation of Rule 6-E—that is, the Federal Rule of Criminal Procedure, Rule 6-E in reference to the grand jury secrecy. These documents will be received in evidence assuming they comply with one of the above stated ground rules, and in the Court's final order and judgment herein, a determination will be made whether or not the documents will be considered. Any government calculations in this matter should be in the alternative. That is, with any of such Rule 6-E documents being included, and also them being excluded. (Vol. I Record, pp. 44, 45)

In entering Findings of Fact and Conclusions of Law, the trial court ultimately made a decision on the status of the materials obtained by the government in violation of Rule 6(e)—and that was to exclude all such documents as evidence when calculating the extent of defendants' unjust enrichment through their miscertification scheme.

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[6] The trial court found that the government and Mr. Swartz, the Assistant U.S. Attorney, "were relying on existing case authority" as well as on an order of Judge James O. Ellison entered October 8, 1981 in a criminal case, which held that the literal language of Rule 6(e) did not apply to physical evidence, such as documents and records, if they had been created for purposes not related to the grand jury investigation itself. As noted by the trial court, the ruling in *Sells* was to the contrary. R. 24,258.

Thus in Findings of Facts Nos. 41, and 42, the court found that:

> 41. As a result of the defendants' crude oil purchase and sale policies and practices of miscertification, profits were realized by the defendants of $210,736,532.92. . . . This sum of $210,736,532.92 allows the defendants credit for sales of uncontrolled (stripper and foreign) crude oil as well as some other crude oil which defendants sold for substantially less per barrel price than it paid, which was brought about principally by the tier price averaging scheme discussed in paragraph 23 above. . . .
>
> 42. The plaintiff's claim seeks restitution for unjust enrichment. The defendants should be required to disgorge the amount of profit they have been unjustly enriched due to the crude oil sale certification violations. This sum is the amount of the profits realized by defendants from implementation of their crude oil miscertification scheme which is the sum of $210,736,732.92.... (R. 26,126, 26,127).

By footnote to these two findings, the court noted that:

> The Court by its Order dated January 7, 1983 determined that some of the documents were obtained by the Government in violation of F.R. Crim. P. 6(e). *This restitution amount of $210,736,532.92 excludes said documents from the calculation as an appropriate sanction.*" (R. 26,127) (Emphasis supplied.)

In Conclusion of Law No. 12, R. 26,144, the court ruled that:

> During the entire period beginning in May 1976 and continuing through January 1981, defendants falsely certified or failed to certify 177,605,924.48 barrels of crude oil in violation of 10 C.F.R. Secs. 212.131, 210.62(c) and 205.202. However, for purposes of restitution the miscertified barrels total 167,340,263.01 and a restitution amount of $210,736,532.92. . . .

Again by footnote, the court explained that "as an appropriate sanction" the figure of $210,736,532.92 excluded the Rule 6(e) material from calculation.

We find that admission of 98% of the documents in question was correct and without error since the grand jury secrecy rule does not apply to documents which are already a part of the public record. The public has the right of access to all criminal trials, as well as the right to inspect and copy all records of judicial proceedings not under seal. All of the questioned documents admitted by the trial court were introduced in evidence as Exhibits 27 and 53 in the criminal trial or were physically present in court to support the summary Exhibits 80 and 81 admitted under Rule 1006, Fed. R. Evidence. These "back-up" materials were in fact the real evidence presented in the case. The summaries only avoided the unnecessary introduction of multi-volumes of paper material. These supporting documents did not need to be separately admitted in evidence, as long as they were made available to other litigants and the court. *Mid-continent Broadcast Co. v. North Central Air, Inc.*, 471 F.2d 357, 359-360 (8 Cir. 1973). Here, it is admitted that the documents supporting the summary exhibits had been turned over to defendants during discovery in the criminal case, the documents were present in the courtroom throughout the criminal trial, and they were in fact the subject of extensive cross-examination during that criminal trial, following the admission of the summary exhibits 80, and 81. (Criminal Trial Transcript pp. 3034-3047, Vol. 47, Record, pp. 22,592-22,605). Under these circumstances, we are satisfied that the documents supporting the summary exhibits were no longer subject to the grand jury secrecy requirements of Rule 6(e).

The government contends that the trial court erred in excluding the remaining 2% of the documents in question because these third party business records, all physical items of evidence, were not within the scope of "matters

occurring before the grand jury," subject to Rule 6(e) protection. The argument is made that physical items of evidence, such as these business records, do not reveal what occurred before a grand jury, because they were created *before* the grand jury at issue even came into existence. In this respect, the government relies upon the reasoning expressed by the Third Circuit in *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3 Cir. 1980):

> The mere fact that a particular document is reviewed by a grand jury does not convert it into a 'matter occurring before the grand jury' within the meaning of 6(e). Documents such as the business records sought by the Commission here are created for purposes independent of grand jury investigations, and such records have many legitimate uses unrelated to the substance of the grand jury proceedings.

A number of other circuit courts have determined that documents are subject to the provisions of Rule 6(e). See *e.g.*, *Fund for Constitutional Gov. v. National Archives*, 656 F.2d 856, 868-870 (D.C. Cir. 1981). Whatever may have been the state of law prior to the decision of the Supreme Court in *United States v. Sells Engineering, Inc.*, *supra*, the Court in *Sells*, speaking in terms of "grand jury materials," determined that documents which had been produced before a grand jury could not be disclosed to attorneys and others within the Justice Department's Civil Division, without a prior court order obtained after a showing of particularized need.

The government suggests that the ruling in *Sells* should not be applied retroactively. The Ninth Circuit has held, however, that the companion case to *Sells*, *United States v. Baggot*, 463 U.S. 476, 77 L.Ed.2d 785 (1983), should apply to a disclosure order filed three years before *Baggott* was decided.* *In Re Sells*, 719 F.2d 985 (9 Cir. 1983). As pointed out by the Ninth Circuit,

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* In *Baggot*, the Supreme Court held that disclosure of grand jury materials for use in an IRS audit of civil tax liability

> The general rule is that an appellate court should apply the law as it stands on the date of the appellate decision. See *Thorpe v. Housing Authority*, 393 U.S. 268, 281-83, 89 S.Ct. 518, 525-27, 21 L.Ed.2d 474 (1969); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). This is true even if the result is reversal of a decision that was correct when made. Courts have made exceptions to this general rule to prevent manifest injustice, . . . but this is not such a case. . . . (719 F.2d at 990).

In determining that the government had violated the provisions of Rule 6(e) as to 2% of the questioned documents, the trial court correctly interpreted and applied *existing* law, as found in the ruling of the Supreme Court in *Sells*. As to these documents, defendants have obtained the relief which they sought for in its ultimate findings of fact and law, the trial court excluded all of these documents in its determination of liability. The trial court did not abuse its discretion in electing to impose this exclusion as an appropriate sanction.

IV. *Validity of the Regulations*

Defendants contend that the trial court erred in denying their supplementary motion for summary judgment since the regulations upon which the government relied were invalid and of no effect because they had been adopted or amended without proper notice or opportunity for oral comment.

The history and application of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. Sec. 1904 note, and the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. Secs. 751 et seq. have been many times reviewed by the Court and that history will not be again reviewed

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is not available because an investigation to determine tax liability is not preliminary to, or in connection with, a judicial proceedings within the meaning of Rule 6(e).

in detail. The Cost of Living Council originally set up a two-tier pricing system for price controlled, "old", oil, and free market priced, "new", oil 6 C.F.R. Sec. 150.354. On February 1, 1976, the regulations were amended to create a three-tier crude oil pricing system that was in effect for the pricing periods here in question. 10 C.F.R. Secs. 212.72-212.76. Under these provisions, there were two levels of price controlled oil (lower tier, or old oil, and upper tier or new oil), as well as free market priced oil. Production up to a level set during a base period was sold as old oil, the excess could be sold at a higher controlled price as "new" oil, while the third tier consisted of foreign crude oil and, after September 1, 1976, stripper oil, both of which could be sold at free market prices.

In order to equalize the benefits of price controlled oil, the Federal Energy Office set up the "Old Oil Allocation Program" in 1974. This program, referred to as the "Entitlements Program", reallocated cost benefits received by those refiners who had access to large quantities of price controlled oil to those refiners who were obliged to rely on sources providing high cost, uncontrolled oil. Under this program each refiner was issued monthly "entitlements" to its proportionate share of the national supply of price controlled oil. If its entitlements were fewer than the number of barrels of lower tier oil actually refined for the month, the refiner was required to purchase additional entitlements from refiners who did not have access to lower priced oil. The price of each entitlement was set by the Department of Energy each month and was generally equal to the difference in price between the average cost of lower tier oil and the average cost of oil not subject to price controls.

From the beginning, *producers* of crude oil were required to certify in writing to their purchasers the tier of each volume of crude oil sold. 6 CFR Sec. 150.354(c)(4) (1973). When the entitlements program was estab-

lished the certification regulations were extended to all crude oil *resellers* in order to identify and trace particular transactions in crude oil to the refinery. 10 C.F.R. Sec. 212.131. A reseller was defined as a firm which carried on the trade or business of purchasing crude oil and reselling it, "without substantially changing (its) form, to purchasers other than ultimate consumers." 10 C.F.R. Sec. 212.131.

From November, 1974 until September, 1976, a reseller was required to certify in writing all lower tier oil and the lawfulness of the prices charged. 10 C.F.R. Sec. 212.131(a)(2) (December 4, 1974). After the three-tier system was adopted, a reseller was required to certify each different tier in each resale. Thus, 10 C.F.R. Sec. 212.131(b)(1) provided that:

> (E)ach seller of domestic crude oil . . . shall, with respect to each sale of domestic crude oil . . . certify in writing to the purchaser the respective volumes of and . . . per barrel prices for the old crude oil, new crude oil, stripper well crude oil, and other domestic crude oils . . . . The certification shall also contain a statement that the price charged for domestic crude oil is no greater than the maximum price permitted . . . by law.

Section 212.131(c) of 10 C.F.R. made it unlawful for a reseller to sell crude oil unless it provided the required certifications. These certifications were to be in writing either upon the invoice or by separate instrument. Sec. 212.131(d).

Crude oil resellers were prohibited from engaging in any practice that circumvented or contravened or resulted in the circumvention of the agency's regulations. 10 C.F.R. Sec. 205.202, formerly Sec. 205.201. A reseller was also prohibited from employing any practice that constituted a means to obtain a price higher than that permitted by the regulations. 10 C.F.R. Sec. 210.62(c). All firms were required to maintain appropriate records

and to provide access to such records when requested by the agency. 10 C.F.R. Sec. 210.92(a) and (b). Beginning in January, 1978, crude oil resellers were required to file monthly reports on Form ERA-69 for the purpose of determining compliance. 10 C.F.R. 212.187(b). Following decontrol, the record keeping requirements were continued in effect for all transactions prior to the date of decontrol, April 1, 1981. 10 C.F.R. Sec. 210.1 (April 3, 1981).

Under this regulatory scheme, if price controlled crude oil was miscertified as uncontrolled oil, then "old oil" receipts by refiners would be artificially reduced, thus decreasing the ratio of "old oil" to all refined oil and distorting the entitlements program. This would result in fewer "old oil" entitlements being issued, thus increasing the cost of crude oil for all refiners because less low priced oil would be available to lower the average. These higher costs would then be passed on by the refiners to others in the distribution chain, and finally on to the ultimate consumers.[7]

In this appeal, defendants contend that there was never a valid DOE regulation which required any form of certification by crude oil resellers because the DOE did not comply with the rule-making requirements of the Administrative Procedure Act (APA), 5 U.S.C. Secs. 551-559, the Federal Energy Administration Act (FEAA), 15 U.S.C. Sec. 766, and/or the Department of Energy Administration Act (DOEOA), 42 U.S.C. Sec. 7191. These arguments were presented to, fully considered, and then overruled by, the district court in a lengthy Order

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[7] In *Union Oil Co. of Cal. v. U.S. Dept. of Energy*, 688 F.2d 797, 802 (TECA 1982), *cert. den.*, 459 U.S. 1202, 103 S.Ct. 1186, 75 L.Ed.2d 433 (1983) we discussed the effect upon the Entitlements Program of miscertifications of crude oil production. *See also* our discussion in *United States v. Exxon Corp.*, 778 F.2d 1240, at p. 1284-1286 (TECA 1985), *cert. den.*, —— U.S. —— (January, 1986), *rehearing denied*, —— U.S. —— (April 7, 1986).

filed on April 4, 1984. (Vol. I, Defendants' Record, Item 9. In order to avoid undue expansion of this opinion, we adopt the findings of the District Court in reaching our conclusion that the trial court properly found that the regulations are procedurally and substantively valid. Specifically, we conclude that the trial court properly found:

1. That the first amendment to Sec. 212.131 which required all resellers to certify appropriate classifications contained a request for comment, comment was in fact received, and there was substantial compliance with the notice required of the APA, 5 U.S.C. Sec. 553. *People of the State of California State Lands Comm'n v. Simon*, 504 F.2d 430, 439 (TECA 1974), *cert. den.*, 419 U.S. 1021 (1974).

2. Section 212.131 was in fact repromulgated on December 4, 1974 in a procedurally valid manner, and it was therefore unnecessary for the court to pass on the validity of the August 29, 1974 amendment. *Atlantic Richfield Co. v. U. S. Dept. of Energy*, 655 F.2d 1118, 1127 (TECA 1981).

3. When the FEA amended the reseller certification requirements of Sec. 212.131(b)(1) effective September 1, 1976, to require separate identification of old, new, and stripper oil, it determined that the certification provisions would be modified without an opportunity for prior written comment or oral testimony.[8]

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[8] The FEA explained that:

> "The amendments are effective September 1, 1976, because any delay in their effectiveness as compared with the statutory effective date of the exemption of stripper well crude oil could result in inconsistencies between the pricing of stripper well crude oil (and other exempt crude oils) and their treatment under the entitlements program. Such a delay could also be detrimental to some refiners, in that the cost equalizing calculations of the entitlements program would not take into account for those refiners the higher exempt prices for these crude oils." (41 Fed. Reg. 37309).

The action of the FEA complied with the provisions of 15 U.S.C. Sec. 766(i)(1)(B) which allowed the FEA to proceed without notice and opportunity to comment "where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order." The September 1976 amendment to Sec. 212.131 was procedurally valid.

4. New Subpart L regulations effective January 2, 1978 set out new pricing standards. On December 23, 1977, Sec. 212.131 was amended to state that certifications must contain a statement that prices charged were determined in accordance with the requirements of Subpart L. This amendment was not mentioned in the notice of proposed rule-making issued in August, 1977 in connection with new Subpart L rules, and thus the requirements of the APA and the FEAA were not complied with. Since all sellers were required to follow Subpart L anyway, beginning January 1, 1978, the December, 1977 amendment was only a technical amendment to the certification requirements, there was no substantive change in the duties of the resellers, and thus the failure of the agency to give notice and opportunity for comment as to this amendment did not invalidate the regulation. *Nat. Helium Corp. v. Federal Energy Administration*, 569 F.2d 1137, 1146 (TECA 1978).

5. The provisions of 10 C.F.R. Sec. 210.62(c), which prohibit any firm from employing any practice designed to obtain unlawful prices was formerly codified as 6 C.F.R. Sec. 150.20, as adopted by the Cost of Living Council. When the Federal Energy Office was created, it repromulgated the old CLC regulations with notice and opportunity for comment. Inadvertently, the recodification did not include Sec. 150.20, but correction was made in February, 1974, with the explanation that Sec. 150.20 had been omitted and that the reinclusion of Sec. 150.20, as Sec. 210.62(c), was a technical correction. Under 5

U.S.C. Sec. 553(b)(3)(B), the FEO found there was good cause to promulgate the regulations immediately without inviting comment. The fact that there was no notice and opportunity for comment does not invalidate Sec. 210.62(c). We recently addressed the merits of violations of Sec. 210.62(c) in *Eastern Air Lines v. Mobil Oil Corp.*, 677 F.2d 879, 881 (TECA 1982), and *USA Petroleum Corp. v. Anaconda Co.*, 653 F.2d 502, 510-511 (TECA 1981).

6. Section 205.202 of 10 C.F.R. provides that:

> Any practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of this chapter or any order issued pursuant thereto is a violation of the DOE regulations stated in this chapter.

This section, previously numbered Sec. 200.8, and Sec. 210.81, was previously included in proposed rulemakings in December, 1973, and in July, 1974 at which time notice and opportunity to be heard were properly given. Accordingly, Sec. 205.202 is procedurally valid.

7. Defendants contend that Sec. 212.131 is substantially invalid because it is unconstitutionally vague, and because the DOE did not consider the relevant factors as required by the EPAA before promulgating that section, and no rational basis for it exists.

Section 212.131 provides in pertinent part that:

> (b)(1) *Reseller certification.* Each seller of domestic crude oil . . . shall, with respect to each sale of domestic crude oil . . . certify in writing to the purchaser (i) that the price charged for the domestic crude oil is not greater than the maximum price permitted pursuant to this part and (ii) the respective volumes of and respective per barrel prices for the—
>
> (A) Lower-tier ('old') crude oil . . .
>
> (B) Upper-tier ('new') crude oil . . .

(C) Crude oil transported through the trans-Alaska pipeline . . .

(D) Stripper well crude oil;

(E) Incremental tertiary crude oil;

(F) Tertiary incentive crude oil;

(G) Newly discovered crude oil;

(H) Market Level new crude oil;

(I) Heavy crude oil; and

(J) Other domestic crude oils the first sale of which is exempt from the provisions of this part—included in the volume of domestic crude oil so sold.

As noted by the trial court, it is clear that this regulation requires a reseller of crude oil to maintain certifications for particular volumes of crude oil transactions. This language adequately describes the conduct required of sellers of crude oil. While a regulation could have been drafted more precisely, the doctrine prohibiting vagueness even in criminal law, requires "no more than a reasonable degree of certainty." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340, 96 L.Ed. 367, 371 (1952). In *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498, 71 L.Ed. 2d 362, 371-372, the Supreme Court pointed out that the degree of vagueness that the Constitution will tolerate depends in part upon "the nature of the enactment":

> Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

8. Defendants also claim that Sec. 212.181 is substantively invalid because the DOE failed to consider

the objectives set forth in 15 U.S.C. Sec. 753(b)(1) which provides that regulations issued under the EPAA shall, to the extent practicable, provide for the public health, safety and welfare; maintain all public services, and agricultural operations; preserve an economically sound and competitive petroleum industry; allocate crude oil so as to permit refineries to operate at full capacity; provide for equitable distribution of crude oil and products at equitable prices; maintain the exploration for, and production of, fuels and other minerals; promote economic efficiency; and minimize economic distortion and unnecessary interference with market mechanisms.

In setting up the Entitlements Program, the FEA fully considered all of those objectives. In *Cities Service Co. v. FEA*, 529 F.2d 1016, 1025, (TECA 1975), *cert. den.*, 426 U.S. 947 (1976), we determined that the entitlement regulation was "a rational response to the changing conditions under which the objectives of the (EPAA) section 4(b) must be read," and that the regulation was not arbitrary, capricious or an abuse of discretion. The certification regulations were implemented to assure that the Entitlements Program would operate in such a manner that each refiner could determine the composition of the crude oil which passed through its refinery. Under such circumstance, it is clear that the DOE gave full consideration to the objectives described above, and that such regulations are substantively valid.

V. *Evidentiary Rulings*

In proving its case, the government prepared an analysis of defendants' crude oil transactions over the years, and this analysis, referred to as "the audit", was received in evidence as Plaintiff's Exhibit 1. As described by defendants, this audit included (a) 50 volumes entitled "BPM, Ltd., Analysis of Matched Purchases and Sales"; (b) 50 volumes entitled "BPM, Ltd., Source Documents", which included purchase invoices, sales invoices,

purchase contracts, and sales contracts; (c) 50 volumes entitled "BPM, Ltd., Analysis of Transactions by Pipeline Locations and Supporting Documentation"; (d) 2 volumes entitled "BPM, Ltd., Summary Schedules and Source Documents Relating to Matched and Unmatched Barge Transactions"; and (e) 1 volume entitled "BMP, Ltd., Documentation to Support Transactions with Trucked Crude Oil".

The "source documents" mentioned above were generally documents obtained from third parties who transacted business with defendants, and they were offered in evidence, supported by third party interrogatories sent by the government to some 64 separate companies. Defendants objected to all such evidence as hearsay, claiming that the "personal knowledge" requirements of Rules 602 and 806(b) of the Federal Rules of Evidence had not been satisfied.[9]

Rule 803(6), Fed. R. Evid., the Business Records Rule, provides an exception to the general rule prohibiting hearsay evidence, in the case of:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Rule 803(24), sometimes referred to as the "residual hearsay exception", further provides for the admission of:

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[9] Rule 602 provides that a witness may not testify to a matter without personal knowledge of that matter.

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement in evidence. . . .

Prior to trial, the parties spent several days before the Magistrate in an unsuccessful attempt to reach understanding on the admissibility of documentary evidence. After receiving the Magistrate's report, the trial court then conducted a five day hearing upon defendants' hearsay objections to almost all of the government documentary evidence. (Vols. I through V, Record, pp. 1 through 1117). Before doing so, the court set out the ground rules which would govern all rulings on this type of evidence:

> Let me make some basic comments here before we get underway in this matter, with specific further de novo document exhibit discussion. Of course, the underlying consideration in reference to this myriad of documents is: Do they, or does the document have the necessary indicia of reliability and trustworthiness. After reviewing this matter with the magistrate, the following are general views of mine. And I say reviewing this matter with the magistrate, I also have reviewed what briefs were filed on the subject of these exhibits up through noon of last Friday.
>
> First, if the documents were produced by the defendants or entities owned by the defendants pursuant to a subpoena or voluntarily and they appear to have relevance to the issue of alleged miscertification here, they probably will be received in evidence. Authority for this conclusion is Rule 901-A, 901-B

(4), 803(6), 803(24) and a couple of applicable cases on the subject are Fisher versus U.S. 425 U.S. 391 at 418, *U.S. v. Fox*, 721 Federal 2nd 32, pages 38 to 40.

Secondly, documents authenticated by a third party records custodian wherein the defendants have been given the right of cross-examination concerning these documents, and if appearing relevant to the issues of crude oil tier certification, will be received in evidence. The same cited Federal Rules of Evidence sections the Court thinks are applicable here. Cases on that subject the Court thinks are relevant are *Rosenberg v. Collins*, 624, Federal 2nd, 659 to 665, *U.S. v. Evans*, 572 Federal 2d, 455, at 490 and *U.S. v. Veytia-Bravo*, 603 Federal 2nd, 1187, 1191 to 1192.

Next, documents produced by a third party, . . . by subpoena or otherwise—regarding which the defendants have had no right to cross-examination, will probably not be received in evidence unless during the trial, an appropriate witness should provide the necessary predicate for the document to be admitted and thereby affording the defendants the right of cross-examination.

The next category is the box. That is, Plaintiff's Exhibit 53 in the criminal trial of *U.S. v. Sutton*, case 81-CR-97, in this court, which is documents 1 through 4106 in this case, will be received in evidence based upon the ruling of the 10th Circuit . . . . In reference to those documents, the better approach would be to have the criminal trial witness, if available to supply the underlying testimony for admission of the 'box'. However, if the witness is not available or is outside the 100 mile subpoena distance, the relevant parts of the criminal trial transcript should be offered as a part of the record in this case.

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Concerning the issue of trustworthiness, a consideration in this case is that 10 C.F.R. Section 210.92 requires the crude oil reseller to maintain

> appropriate records for review on a proper request. . . . The vast majority of the records required to be maintained by the defendants, it appears at least at this juncture in this case, have not been produced by the defendants. Added to this, is the fact that the individual defendant in this case, Mr. Robert Sutton, was convicted of conspiracy to obstruct justice in attempting to destroy records. The ideal situation is that of the reseller who has maintained all of its books and records. . . . We don't have that here.
>
> Therefore, the Court will look to the assurances of trustworthiness in the context of what I discussed above. The Court thinks this is within the spirit and the intend(sic) of Federal Rules of Evidence expressed in Rule 901-B(4) and 803(24). (R. pp. 41-44).

The cases relied upon by the trial court establish that any person with authority to do so may attest to the authenticity of business records, even though he was not the preparer of the record, and even though he can not personally attest to the accuracy of the information contained in the business record. *Rosenberg v. Collins*, 624 F.2d 659, 665 (5 Cir. 1980). The custodian need not even have been employed by the business when the records were created or received. *United States v. Evans*, 572 F.2d 455, 490 (5 Cir. 1978). In *United States v. Veytia-Bravo*, 603 F.2d 1187 (5 Cir. 1979), *cert. den.*, 444 U.S. 1024 (1980), a case involving business records kept in compliance with federal regulations, the court stated:

> Where circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation. Testimony by the custodian of the record or other qualified witness that the record is authentic and was made and kept in the regular course of business will suffice to support its admission. (603 F.2d at 1191-92)

As noted, in addition to the business records exception to the hearsay rule, the trial court also relied upon the provisions of Rule 803(24), which permit, as justice may require, the admission of probative hearsay evidence, when more direct evidence can not be procured through reasonable effort. In this case, it is clear that defendants failed to maintain the records required by law. When a party fails to keep, or refuses to produce documents, or in fact destroys evidence, an adverse inference may certainly be drawn, and where vital documents are missing, Rule 803(24) is the obvious vehicle to be employed in serving justice. See *Karme v. C.I.R.*, 673 F.2d 1062, 1065 (9 Cir. 1982).

Defendants also claim that the testimony of James L. Louthan, the government's principal audit witness, should have been excluded as opinion testimony by a lay witness, and as inadmissible hearsay. Louthan supervised the audit and summarized the work of approximately 20 auditors who worked on the project. His testimony was properly admitted under Rule 602, Fed. R. Evidence, as testimony based upon personal knowledge. Rule 701 Fed. R. Evid. allows a lay witness to give opinions or to draw inferences "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." In addition, the record demonstrates that defendants had ample opportunity to depose this witness concerning the audit for several days prior to trial. Mr. Louthan's testimony was properly admitted.[10]

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[10] In its Findings of Fact and Conclusions of Law, the trial court described the nature of Louthan's testimony in this manner:

> James Louthan was the DOE auditor in charge of the audit. As the supervising auditor he had a hybrid expert-nonexpert status. In interpreting and explaining the audit methodology employed, as well as his 'understanding' of the applicable DOE regulations, Louthan could be

Defendants next contend that all evidence concerning what they term "reseller chains" should have been excluded because the government failed to provide pretrial discovery in this area, and because the "reseller chain" documents and testimony were irrelevant in this action. Prior to trial, the trial court directed the government to provide some reseller chain evidence in order to establish the effect of Sutton's miscertifications on the entitlements program. While such evidence of transfer chains would not be relevant to the question of whether Sutton miscertified crude oil, it was offered, at the direction of the trial court, as relevant rebuttal evidence to defendants claim of lack of harm to the entitlements program, the industry and the consumer. The defendants deposed Louthan on the chain documents prior to trial, and another opportunity to depose this witness in the middle of the trial was waived. There was no error in the admission of evidence concerning reseller chains in which defendants were involved.

Evidentiary rulings by our trial judges will not be overturned on appeal absent a clear abuse of discretion. Here, the district court's evidentiary rulings are fully supported by the record and the law.

VI. *Liability*

At trial, the government established the audit of defendants' certifications for the period of May, 1976 through January, 1981 upon the basis of third party business records, and records which defendants produced for the grand jury. Crude oil transactions were recon-

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considered an expert. Concerning the DOE policy and rationale behind the policy and/or regulations, Louthan could not be considered an expert as he was not involved in the formulation of the policy or regulations nor did he have such authority. In the areas Louthan could be considered an expert, the defendants were granted extensive discovery. (Findings, page 10, f.n. 1)

structed by matching corresponding purchases and sales of crude oil by type and quality, pipeline delivery points and volumes. James Louthan, who directed the audit, testified for eight days, explaining the audit methods and its results. Defendants failed to file DOE Form ERA-69, the "Crude Oil Reseller's Self-Reporting Form" for each month which included sales during the period of January, 1978 through January, 1981. The trial court found that the audit methodology was reasonable and appropriate:

> Most of defendants' purchases and sales had to be reconstructed from third party records, because defendants have no adequate records of their crude oil reselling activity beyond those reflecting transactions occurring during the period of May 1980 through January 1981 . . . . The certification audit methodology of matching crude oil purchases and sales of the defendants, although often involving auditor judgment, was reasonable and appropriate in view of the defendants' failure to maintain and keep accurate records. The audit matching process was essentially supported by the reconstructed records. Although the defendants took issue with the audit methodology, they offered no alternative certification audit to rebut the government's audit. (Finding of Fact No. 27)

This audit established that defendants generally purchased more lower tier and upper tier crude oil by paying prices *above* the prevailing market price, and then, upon resale, defendants miscertified the crude oil as either upper tier, stripper, or foreign crude oil, and generally resold the miscertified crude oil at prices *below* the prevailing market price for the new tier to which it had been miscertified:

> The defendants would usually purchase from a reseller lower tier, upper tier and stripper crude oil and the defendants would then average the purchase price and resell all of the oil certified (miscertified) as stripper, adding a profit of approximately one dollar ($1.00) to one dollar and a half ($1.50) per barrel. The profit realized may have been within the

pricing guidelines, but the bulk of the oil resold was miscertified by tier.

> By July 1977 and continuing thereafter, Sutton began to buy from, miscertify and sell directly back, usually on the same day, to the same resellers on a regular and continuous basis. . . . This could aptly be described as tier laundering, i.e., from controlled with its lower market price to uncontrolled with its higher market price and economic potential. . . . (Findings of Fact Nos. 23, 24)

The evidence of miscertification was overwhelming. From May 1976 through January 1981, defendants purchased 133 million barrels of lower tier oil, 175 million barrels of upper tier oil, and 33 million barrels of stripper oil. (F/F 33) During that same period, defendants sold only 8 million barrels of lower tier oil, 31 million barrels of upper tier oil, and over 283 million barrels of stripper oil. These figures establish that defendants bought 269 million more barrels of price-controlled oil than they sold, and sold 250 million more barrels of uncontrolled stripper oil than they bought. On the basis of this evidence, the trial court found that for the relevant period, defendants falsely certified, or failed to certify, 177,605,924.48 barrels of crude oil in violation of 10 C.F.R. Secs. 212.131, 210.62(c), and 205.202. For purposes of restitution, the miscertified barrels were set at 167,340,263.01, with a restitution amount of $210,736,532.92.[11] (Conclusion of Law 12) In addition to the documentary evidence provided by the audit, the testimony of various employees of defendants established the true nature of defendants' crude oil reselling transactions.[12]

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[11] This reduction resulted from excluding 2% of the grand jury documents offered in evidence.

[12] E.g., Robert B. Sutton told his employees, "We don't buy stripper, we sell stripper." (F/F 19). Robert B. Sutton made an agreement with the president of AWECO to fabricate tier certifications on 12 sales invoices in exchange for a $1,000,000 payment to a Sutton owned company. (F/F 25).

The trial court's finding that defendants falsely certified or failed to certify crude oil as stated is supported by substantial evidence and is not clearly erroneous.

Defendant Robert Sutton contends that the trial court erred in holding him personally liable for the full amount of defendants' miscertifications.

He first alleges that Section 5(a)(4) of the EPAA, 15 U.S.C. Sec. 754(a)(4) provides the exclusive remedy for knowing and willful violations of the Act by corporate officers, thereby precluding imposition of liability upon the basis of alter ego, or tortious conduct. That section provides that:

> Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders or performs any of the acts or practices constituting in whole or in part a violation of paragraph (3), shall be subject to *penalties* under this subsection without regard to any penalties to which that corporation may be subject under paragraph (3) except that no such individual director, officer or agent shall be subject to imprisonment under paragraph (3), unless he also has knowledge, or reasonably should have known, of notice of noncompliance received by the corporation from the President. (Emphasis supplied)

Section 5(a)(3) of the Act, 15 U.S.C. Sec. 754(a)(3), referred to above, provides for imposition of *civil penalties*, as well as criminal penalties for violation of the Act. Section 5(a)(4) neither precludes an action for *restitution* under the provisions of Section 209 of the ESA, nor does it abrogate notions of common law alter ego liability, or liability in restitution for one's own tortious conduct. The legislative history of Section 5(a)(4) explicitly provides that "nothing in the section is intended to change existing case law relating to the individual responsibility of corporate directors, officers or agents for violation of those corporations." *See* S.Conf. Rep. No.

94-516, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Ad. News, 1983, at 2042. *See also, Johnson Oil Co., Inc. vs. U. S. Dept. of Energy*, 690 F.2d 191, 202 (TECA 1982). The fact that a statute does not explicitly provide for piercing the corporate veil does not preclude application of that doctrine. *United States v. Pisani*, 646 F.2d 83, 87-89 (3d Cir. 1981).

Again, the evidence concerning Robert Sutton's control over his various corporate entities is overwhelming, and without dispute. There was evidence of noncompliance with corporate formalities, nonpayment of dividends, failure of directors to play any meaningful role in managing the corporation, absence of any arm's length relationship between Sutton and his corporations, diversion of corporate funds for personal purposes, payment of personal expenses with corporate funds, use of corporate assets for personal purposes, payment of excessive compensation to Sutton and members of his family, the making of non-interest bearing loans to Sutton and his allied companies, and inadequate capitalization of, and intermingling of funds among, Sutton's various corporations, all at his direction.[18]

The trial court found that virtually all of the profits generated by the corporate defendants were obtained through Sutton's illegal crude oil trading operations. Financial statements indicated that the total assets and net worth of defendants Sutton Investments and its subsidiaries, including BPM and Redfish Bay, successor to defendant Scurry Oil Company, were approximately $46.2 million and $14.4 million, respectively. At the time of trial, BPM and Sooner Refining Company had filed for bankruptcy, and in April, 1984, soon after the trial court appointed a receiver because of failure to comply with the court's financial reporting order, Robert B. Sutton

[18] By April, 1980, twelve affiliates owed BPM over $44 million, with $33 million due from 6 firms owned directly by Sutton. (F/F 80).

and Sutton Investments filed for bankruptcy. In its findings of fact, the trial court found that:

> The corporate defendants' creditors, including the United States, have been materially harmed by Sutton's appropriation of corporate funds to himself, his family, and his numerous personally-owned business ventures. As a result, the funds available to the corporate defendants with which to pay the judgment in this case are significantly inadequate. (F/F 102).

As of October 31, 1983, Sutton's stated total personal assets were $39.9 million. His stated personal net worth was $23.8 million. This stated total personal net worth in late 1983 was $23.6 million dollars more than his net worth in 1976 when Sutton initiated his miscertification scheme.[14]

Without reference to state law, this Court has held that the corporate veil may be pierced to hold a controlling shareholder liable for corporation violations of DOE regulations. *United States v. Ariz. Fuels Corp.*, 638 F.2d 239, 244 (TECA 1980), *cert. denied*, 451, U.S. 985 (1981). The Tenth Circuit, applying the Oklahoma law, has recognized the general rule, concluding that "Oklahoma permits the court to disregard the corporate entity if used, (1) to defeat public convenience, (2) justify wrong, (3) to perpetrate fraud whether actual or implied, or (4) to defend crime." *Robertson v. Roy L. Morgan Production Company*, 411 F.2d 1041, 1043 (10th Circuit 1969).[15]

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[14] The government estimated that Sutton withdrew at least $67 million for his personal use during the audit period—$11,511,823 directly, at least $56,247,602 indirectly through his personal business ventures, and approximately $1,261,000 paid to family members.

[15] Sutton contends that the district court should have applied Oklahoma law on the piercing issue, but *United States v. Arizona Fuels Corp., supra*, is fully in accord with the general

In addition to piercing the corporate veil, the district court found that Sutton was liable on account of his own tortious conduct. The finding that Sutton was the central figure in the miscertification scheme is supported by substantial evidence. Liability for tortious conduct depends upon the individual's acts, and not upon any theory of vicarious liability based upon mere status as an owner or other party responsible for corporate activities. A shareholder may be liable if he is the "central figure" in a corporation's tortious conduct. *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F.Supp. 871, 881 (S.D. Ala. 1980), *aff'd as modified*, 669 F.2d 717 (TECA 1982), *cert. denied*, 459 U.S. 887 (1982).

The evidence fully supports the district court's conclusion that Robert Sutton is jointly and severally liable with his corporate defendants because these corporations were Sutton's alter egos and because Sutton personally engaged in tortious conduct. Such findings and conclusions are not clearly erroneous.

VII. *The Nature of Restitution, and the Amount of Recovery*

Under the provisions of Sec. 209 of the ESA, 12 U.S.C. Sec. 1904, *Note*, the district court was authorized to order restitution of benefits received in violation of orders and regulations issued under the Act.[16]

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rule that in federal question cases, where the governing statute is silent, federal common law, not state law controls. Sutton's case citations do not persuade us that Oklahoma law is in any way contrary to the standards applied by the trial court.

[16] Section 209 provides that the Attorney General may bring an action for temporary and permanent injunction to restrain violations, and the court is authorized to issue such injunctions, as well as to "order restitution of moneys received in violation of any such order or regulation."

The defendants contend that the remedy awarded in this action was a penalty, and not restitution, because the government failed to demonstrate unjust enrichment or injury. The argument is made that because the trial court ordered that the monies be disbursed to state governments (allegedly "non-injured parties"), the Court's award constituted a penalty, and not restitution. Upon this basis, the defendants further claim that since the government's claim is a penalty claim, the trial court erred in rejecting the statute of limitations defense, that the penalty claim is barred as a matter of law by the doctrines of collateral estoppel and double jeopardy, and that the trial court erred in denying defendants a jury trial.

This court recently had the occasion to examine at length the nature of the restitution claim under the provisions of Sec. 209 of the ESA. *United States v. Exxon Corp.*, 773 F.2d 1240 (TECA 1985), *cert. den.*, —— U.S. —— (January 27, 1986), *rehearing denied*, —— U.S. —— (April 7, 1986). Defendants' assertion that restitution is appropriate only if both unjust enrichment and injury to third parties is established is without merit. In *Citronelle-Mobile Gathering, Inc., v. Edwards*, *supra*, 669 F.2d 717 at 722, we pointed out that:

> The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. *No proof is required that the plaintiff was damaged, much less the amount of any damage.* (Emphasis supplied)

An award of restitution is an equitable remedy, and not a penalty. Under such circumstances, the district court properly denied Sutton's request for a jury trial. *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95 (2d Cir. 1978).

A civil prosecution under the provisions of Section 209 is not barred by double jeopardy because of a prior un-

successful criminal action. *See, One Lot Stones*, 409 U.S. 232, 235, 34 L.Ed. 2d 438, 442 (1972). Defendant's attempt to avoid this rule by claiming that the restitution awarded by the district court was really a criminal penalty is without merit.

State statutes of limitation are not applicable to cases brought to enforce DOE regulations. *Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, 669 F.2d at 721:

> The primary underlying policy of the ESA is to insure effective enforcement of the pricing regulations on a national scale . . . . As an aide (sic) to such enforcement the DOE has the right to seek restitution in ESA enforcement actions . . . . The right to enforce compliance to such restitution of price overcharges is equitable . . . and suits to enforce equitable rights created by federal law are not subject to state statutes of limitations, even if brought by a private party.

The award of equitable relief in this action is not barred through the doctrine of unclean hands on the part of the government. In June, 1984, defendants filed a motion to reopen the evidence in this case because on June 13, 1984, an article published in the *Wall Street Journal* stated that the federal government itself had violated federal price controls in the sale of oil from wells on federal lands.[17] The district court denied the motion upon the ground that equitable defenses would not be applied to block suits by the United States when such would "frustrate the purpose of its laws or to thwart public policy." *Pan American Petroleum &*

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[17] According to defendants, an inspection of records filed in *Plateau, Inc. v. DOE*, No. C-82-0501, in federal court in Wyoming would reveal that the Interior Department "not only overcharged refiners but flagrantly violated the certification regulation, 10 C.F.R. Sec. 212.131." The government reports that the Office of Hearing and Appeals of the DOE has determined there were no certification violations.

Transp. Co. v. United States, 273 U.S. 456, 506, 71 L.Ed. 737, 747 (1927). *See also, United States v. City of Milwaukee*, 395 F. Supp. 725, 727 (E.D. Wisc. 1975).

Whether an equitable defense is available to a party is a question addressed to the discretion of the trial court. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1337 (10th Cir. 1982). Given the nature of the public interest in equitable and fair enforcement of the ESA and EPAA, together with the fact of Sutton's "brazen disregard for and violation of the tier certification requirements", we find that the trial court did not abuse its discretion in denying the motion to reopen the evidence.

We now turn to the amount of the judgment for restitution which was awarded in this action.

The defendants complain that the government's audit was inaccurate and unreliable, providing no basis for a calculation of violation amount. As previously noted, the trial court found that the certification audit methodology "was reasonable and essentially accurate" and that conclusion is supported by evidence, and not clearly erroneous. It is to be noted that defendants offered no alternative certification audit to rebut this evidence.

The government contends that the restitution award should be increased to effect what it terms "full restitution" in this action.

In its amended complaint, the DOE computed a miscertification violation in the amount of $711,352,450.17,[18] an amount which reflected the difference between the prices defendants actually paid for the miscertified crude oil. At the request of the court, the government prepared and presented several alternative remedial calcula-

[18] This violation amount would be $696,063,142.16 if transactions attributable to the 2% of the grand jury documents obtained in violation of Rule 6(e) are excluded.

tions for the court's consideration. These are summarized in PX 304, R. 19845-81.[19]

The trial court ultimately based its award upon total profits realized by defendants through their miscertification scheme. In this respect, the court took into account defendants' practice of selling all tiers of crude oil at one averaged price with a markup, and this of course resulted in losses on some sales of oil. The court's specific findings in this regard were as follows:

> As a result of the defendants' crude oil purchase and sale policies and practices of miscertification, profits were realized by the defendants of $210,736,532.92. (PX-310) This sum of $210,736,532.92 allows the defendants credit for sales of uncontrolled (stripper or foreign) crude oil as well as some other crude oil which defendants sold for substantially less per barrel price than it paid, which was brought about principally by the tier price averaging scheme discussed in paragraph 23 above. . . .
>
> The plaintiffs' claim seeks restitution for unjust enrichment. The defendants should be required to disgorge the amount of profit they have been unjustly enriched due to the crude oil sale certification violations. This sum is the amount of the profits realized by defendants from implementation of their crude oil miscertification scheme which is the sum of $210,736,732.92. . . . (F/F 41, 42)

This action is not, of course, a suit for damages. It is an equitable action, designed to make the defendants

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[19] These calculations included figures on defendants' illegal profits on "upward miscertification" of crude oil; the entitlements impact of defendants' miscertifications; total profits on all miscertified or uncertified crude oil, using weighted average costs/and/or selling prices; profits on upwardly miscertified or uncertified barrels based upon an "average profit" per individual sales invoice; and special subpart F and L pricing, analyses involving computations upon a "transaction basis" and upon a "weighted average basis" for certain periods from May, 1976 through December 1977.

"disgorge" their unjust enrichment. The amount of the judgment rendered in this action is supported by the evidence, it is equitable in nature, and we find no error.

The defendant Robert Sutton claims that if he is to be held personally liable, then his liability should be no more than the amount of his "excess compensation"—a figure which he claims to be in the amount of $1,986,900. The record reflects that Sutton's personal benefits included not only "excessive salaries," but far greater amounts in the form of unpaid loans, personal use of corporate assets, etc. Sutton's liability for his own tortious conduct is certainly not to be limited to the money he actually put in his pocket. A person who is the "animating force" for regulatory violations is fully liable even though he does not personally receive all benefits of his illegal activities. *See Sauder v. Department of Energy*, 648 F.2d 1341, (TECA 1981), and *United States v. Exxon Corp.*, *supra*, 773 F.2d 1240, 1269-1273.

Finally, we find that the award of prejudgment interest in this action was entirely correct. We refer the parties to our discussion of this aspect of restitution in the *Exxon* case, *supra*, 773 F.2d 1240, at pp. 1277-1279. In this instance, the trial court determined that interest would be based upon the schedule of interest rates applied by the DOE in administrative enforcement actions after February, 1980. This is the rate adopted and approved in the *Exxon* case.

VIII. *The Remedy*

Upon the basis of trial testimony, the district court determined the effect of defendant's miscertifications upon the entitlements program:

> Defendants' upward miscertifications decreased the volume of domestic price-controlled crude oil available to refiners and reported to the Old Oil Allocation (Entitlements) Program, thus artificially decreasing

> the benefits to be distributed by the Entitlements Program and increasing the post-entitlement cost of all crude oil to all domestic refiners. . . . Defendants' upward certifications also tended to increase the disparities in refiners' crude oil costs which the Entitlements Program was intended to reduce. . . . Upward miscertifications, by removing old oil from the entitlements system reduced the entitlements 'subsidy', thereby increasing the post-entitlements crude oil costs to all refiners. . . . Upward miscertifications also had the effect of increasing the prices of refined petroleum products, although due to the economic complexities it is difficult, if not impossible, to determine the precise amount of that price increase. . . . (F/F 43)

The trial court recognized that refiners could pass through these increased costs to their customers, and their customers to their customers, through the chain of commerce to the ultimate consumer of motor gasoline, home heating oil, and other petroleum products, the result being that the ultimate loser was the petroleum products consuming public.

Under these circumstances, the district court ordered that the proceeds of the restitution judgment be placed in an escrow fund for subsequent distribution to the states for use in one or more of three energy conservation programs. These programs are for the weatherization of public buildings under Part A of the Energy Conservation in Existing Buildings Act of 1976, 42 U.S.C. Secs. 686 et seq.; energy conservation programs for schools and hospitals under Part G of Title III of the Energy Policy and Conservation Act, 42 U.S.C. Sec. 6371 et seq., and financial assistance for low income families under the Low Income Home Energy Assistance Act of 1981, 42 U.S.C. Sec. 8621, et seq.

Under the reasoning set out in our decision in *United States v. Exxon Corp., supra,* 773 F.2d at pp. 1283-1287, we find that the district court exercised its discre-

tion in a reasonable manner by ordering that the restitution judgment be distributed to the states for funding programs designed to benefit public energy consumers. We repeat our observation set out in *Exxon, supra*, 773 F.2d at 1287:

> While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as 'emergency' price regulations, and it is a reasonable means to protect the public interest.

Under all of the circumstances presented in this record, we conclude that the trial court did not abuse its discretion in fashioning its remedy.

The Judgment of the District Court is AFFIRMED in all respects.

POINTER, Judge, concurring in part, dissenting in part.

As noted in my dissent in *Citronelle-Mobile Gathering, Inc. v. Edwards*[1] and echoed by my vote for rehearing en banc of *United States v. Exxon Corp.*[2] I believe that this court distorts the principles of restitution authorized by the statute when it permits a search for worthy beneficiaries of an award of unjust enrichment. However, as this court has rejected that position, I do not dissent on that basis and, rather, write under the constraint that the case *sub judice* is properly treated as one for restitution subject to broad equitable powers of the trial court.

In this light, I agree that the trial court did not err in denying the defendants a trial by jury and selecting suitable persons to receive the defendants' ill-gotten gains. I also concur, in general, with those portions of the majority's opinion upholding the trial court on such matters as (1) the validity of the statute and regulations; (2) the admission of evidence (other than grand jury materials);[3] the finding of gross miscertifications by the defendants; (4) the imposition of individual liability on Robert Sutton,[4] not limited to his "excess" compensation;

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[1] 669 F.2d 717, 723 (TECA), *cert. denied*, 459 U.S. 887 (1982).

[2] 773 F.2d 1240 (TECA 1985), *cert. denied*, —— U.S. —— (Jan. 27, 1986), *reh'g denied*, —— U.S. —— (Apr. 7, 1986).

[3] I would not cite Federal Rule of Evidence 803(24) as a basis for upholding the admission of PX1, because the government did not satisfy 803(24)(B) or give the advance notice required by the last sentence of that Rule. The exhibit was, however, admissible under Rule 803(6) for the reasons given in the majority's opinion. It should be noted that the third-party "interrogatories" which provided the foundation for the source documents were, by agreement of counsel, used in lieu of (and with the same effect as) depositions on written questions.

[4] Although I do not believe that liability may be imposed on Sutton under the statute premised upon "his own tortious conduct," I agree that liability was properly imposed on him under the statute by "piercing the corporate veil(s)."

(5) the rejection of defenses based on double jeopardy, statute of limitations, and "unclean hands"; and (6) the allowance of prejudgment interest.

In two respects, however, I must dissent. In my view, the case should be remanded for further consideration of the amount of the award.

Grand Jury Documents

As discussed in the majority opinion, the government utilized in this case a large number of documents obtained in violation of Fed. R. Crim. P. 6(e) as construed in *United States v. Sells Engineering Inc.*[5] A few of these documents—affecting approximately 2% of the transactions in dispute—were suppressed at the trial, a ruling which this court is affirming as correct. The other documents were, however, admitted in evidence and indeed relied upon to determine the amount of the award, a ruling which this court is also affirming as correct.

The basic rationale for this distinction in treatment is sound and, indeed, not challenged by the appellants: the government should not be precluded in a civil action from using information that was presented in evidence at the prior criminal trial, even though it obtained that information in violation of Fed. R. Crim. P. 6(e). Exhibits 27 and 53 became matters of public record when they were received without qualification in the criminal trial of Robert Sutton, and the trial court properly refused to suppress the information derived from those documents when offered in the present case. Approximately 40% of the unlawful profits found by the trial court was based on those documents and accordingly should be affirmed.

I do disagree, however, about certain of the documents on which approximately 58% of the award is based. Specific data—namely, the number of barrels bought and

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[5] 463 U.S. 418 (1983).

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sold and their certifications—were extracted from these documents and incorporated into summary exhibits 80 and 81, which were then admitted in evidence under Fed. R. Evid. 1006 at the criminal trial.[6] However, the documents themselves were not introduced or otherwise made public in the criminal trial, nor were items of information contained in those documents that are critical to the restitution award—namely, the prices of various transactions.[7]

In holding that these documents were no longer subject to the restrictions of Fed. R. Crim. P. 6(e), the majority explains that the documents had been made available to Sutton and his counsel for examination both before and during the criminal trial. This fact, however, provides no sound basis for disregarding the proscriptions of Rule 6(e). Indeed, in the *Sells* case, as is often the situation, the documents in question were the defendants' own records, of which they presumably had copies. Nor can it be said that these documents became a matter of public record and inspection merely by being produced in the courtroom at the criminal trial for Sutton's examination and use.

I would remand the case for a recalculation of the restitution award, eliminating from consideration information derived from documents obtained in violation

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[6] Exhibits 80 and 81 were simply charts that aggregated for 1979 and 1980, respectively, the total number of barrels bought and sold in those years, subdivided into the categories of "old," "new," and "stripper (foreign & other)."

[7] The majority opinion recites that the summaries "reflected and summed up the contents of all of these documents." A more accurate statement would be that the summaries "reflected and summed up certain items of information from all of these documents"—and it should be emphasized that information critical to the present case was not reflected in those summaries.

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of Rule 6(e) except to the extent that information was publicly revealed during the prior criminal trial.[8]

Methodology of Calculation

In calculating the liability of the defendants, the trial court determined an *average* profit-per-barrel, ascertained by considering both profitable and unprofitable sales, and multiplied that figure by the number of miscertified barrels. The government on cross-appeal asserts that only the particular transactions involving unlawful profits should have been used, raising the amount before interest from approximately $211 million to approximately $700 million. I agree with the majority that—given the defendants' scheme of selling at an averaged price, resulting in some losses which reduced their overall profits—the trial court's basic approach for determining the amount of unjust enrichment was supported by the evidence and within its equitable discretion. I therefore concur in denying the cross-appeal on this issue.

In one respect, however, the methodology used by the trial court was internally inconsistent, and the position on this issue advanced by the government on cross-appeal

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[8] The majority opinion recites that the documents "were the subject of extensive cross-examination", a point made by the government (Appellee's brief, p. 78). The portion of the criminal transcript cited—some 14 pages—reflects, however, not cross examination using or respecting the documents, but rather cross examination of the prosecution's witness involving some monthly worksheets that had been used as an intermediate step in preparing the summaries. The worksheets were not introduced in evidence and only on two occasions during this examination was any mention made about prices—once when the witness stated he was unable to testify whether Sutton's company ever received "stripper" prices for stripper oil, and later when the witness acknowledged that Sutton's company had been charged as high as $45 a barrel for oil. No sound argument can be made that the proscriptions of Rule 6(e) were somehow waived or abrogated by this cross examination.

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is correct. Having determined because of the nature of the scheme practiced by the defendants that all of the transactions, both profitable and unprofitable, should be taken into account in determining the average profit per barrel, the trial court should have multiplied this amount by all of the barrels sold, not just those which had been upwardly miscertified. This adjustment—in view of the affirmance by the majority of the trial court's exclusion under Rule 6(e) of only 2% of the documents—would raise the amount of the award, before adding interest, from $210,736,732.92 to $227,254,951.01. I would, of course, call for this upward adjustment to be made after suppressing substantially more documents under Rule 6(e).

Conclusion

I would remand the case for recalculation of the amount of the award, suppressing additional documents obtained in violation of Rule 6(e) but taking into account under the trial court's formula all sales supported by the remaining evidence. In other respects I join with the majority in affirming the trial court.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROBERT B. SUTTON, SUTTON INVESTMENTS, INC.,
SCURRY OIL COMPANY, BPM, LTD., AND
SOONER REFINING COMPANY, INC.

PETITIONERS,

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT.

APPENDIX B

ANTHONY P. SUTTON
Oklahoma Bar Association #8781
Attorney at Law
4835 South Peoria, Suite 25
(918) 749-5815
Attorney for Petitioners, *pro bono*

SAM P. DANIEL III
Oklahoma Bar Association #2151
Short, Harris, Turner & Daniel
2761 E. Skelly Drive, Suite 700
Tulsa, Oklahoma 74105
(918) 743-6201
Attorney for Petitioners, *pro bono*

MILDRED E. OTEY
Oklahoma Bar Association #6810
2761 East Skelly Drive, Suite 700
Tulsa, Oklahoma 74105
(918)743-6201
Attorney for Petitioners, *pro bono*

RECONSTRUCTED
BPM Ltd. RECORDS

1979

	TOTAL BARRELS	OLD	NEW	STRIPPER (Foreign & other)
BOUGHT	122,678,135.05	53,042,797.03	57,605,194.56	12,030,142.66
SOLD	124,972,578.64	4,007,929.29	6,600,983.30	114,203,665.97

RECONSTRUCTED
BPM Ltd. RECORDS

1980

	TOTAL BARRELS	OLD	NEW	STRIPPER (Foreign & other)
BOUGHT	173,156,655.98	51,810,400.18	104,328,255.54	17,009,192.26
SOLD	164,392,167.92	2,773,450.00	4,116,200.00	157,502,517.92